SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 375

WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, SECOND NEW YORK DISTRICT, PETITIONER

vs.

CHILE COPPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

1 In United States District Court, Southern District of New York

Writ of error

(Filed May 22, 1924)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the district court, before you, or some of you, between Chile Copper Company, plaintiff, and William H. Edwards, Collector of Internal Revenue for the Second District of New York, defendant, a manifest error hath happened, to the great damage of the said defendant as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States Circuit Court of Appeals for the Second Circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 21st day of June, 1924, that the record and proceedings aforesaid being inspected, the said judges of the United States Circuit Court
2 of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 22nd day of May, in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States the one hundred and forty-eighth.

ALEX GILCHRIST,
Clerk of the United States District Court.

The foregoing writ is hereby allowed.

AUGUSTUS N. HAND,
U. S. D. J.

3 [Summons omitted in printing.]

4 In United States District Court

CHILE COPPER COMPANY, PLAINTIFF
against
WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, SECOND NEW YORK DISTRICT, DEFENDANT
} Doc., L. 25/48

Second amended complaint

The plaintiff above named, by Root, Clark, Buckner & Howland, its attorneys, for its complaint, alleges as follows:

For a first cause of action

I. At all times hereinafter mentioned, the plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with a capital stock outstanding of 3,800,000 shares of the par value of $25 per share, a total of $95,000,000.

II. On or about the 9th day of April, 1917, the defendant was duly appointed collector of internal revenue for the Second New York District, and at all times since said date was and still is collector of internal revenue for said district and is a resident and inhabitant of the borough of Manhattan, city of New York, in the Southern District of New York.

5 III. This is an action to recover back taxes alleged by the plaintiff to have been erroneously and illegally assessed against the plaintiff and paid by it under protest, and arising under Title IV, Secs. 407–409 of the revenue act of 1916 (39 Stat. 756, 789).

IV. At all the times hereinafter mentioned, Chile Exploration Company was, and now is, a corporation duly organized and existing under and by virute of the laws of the State of New Jersey, with a capital stock outstanding of 10,000 shares of the par value of $100 per share, a total of $1,000,000. Its principal business has been the mining of copper from mining property in the Republic of Chile, owned by it; since its incorporation said Chile Exploration Company could not at any time have developed its said mining property without borrowing large sums of money, and in order to borrow sums of money sufficiently large for that purpose, it would have been necessary to sell to investors bonds or other obligations secured by a mortgage upon its property; at all times hereinafter mentioned the laws of the Republic of Chile have provided that mining property in Chile could not be sold for debt, at auction or otherwise, so as to vest title thereto in creditors, and therefore said Chile Exploration Company could not at any time effectively mortgage its mining property in Chile so as to secure an issue of bonds or other obligations, and an issue of bonds or obligations of Chile Exploration Company, unsecured by a mortgage upon its mining property

in Chile, would not have attracted investors and would not have been salable in investment markets.

6 V. The plaintiff was organized for the principal purpose of providing a means whereby money could be borrowed from investors in sums sufficiently large to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned it was impracticable for said Chile Exploration Company to borrow such money directly from investors because of said provisions of the laws of the Republic of Chile making it impossible for said Chile Exploration Company effectively to mortgage its property as security for loans. Satisfactory security for such loans could be provided, however, by a pledge as collateral security of the capital stock of said Chile Exploration Company. The plaintiff was according organized on or about April 16, 1913, for the principal purpose of holding the capital stock of said Chile Exploration Company and pledging such capital stock as security for bond issues, the proceeds of which should be used, loaned and advanced from time to time to furnish the necessary capital to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned, the plaintiff has continued to own all of the issued and outstanding capital stock of said Chile Exploration Company. During the period beginning January 1, 1917, and ending June 30, 1917, the plaintiff borrowed money from investors by the issuance of bonds under a trust agreement, a copy of which is attached hereto and marked "Exhibit A." By section 4 of article two of said trust agreement the plaintiff covenanted that the proceeds of the bonds issued as Series A, which are the only bonds which have been issued thereunder, should be used only (a) to pay off certain indebtedness existing on April 1, 1917, and (b) for

7 the acquisition, construction or improvement (properly chargeable to capital account) after April 1, 1917, of property necessary or useful in connection with the mining, refining or marketing of copper or copper ore derived from property owned by said Chile Exploration Company. In addition to the above a certain other issue of bonds made in the year 1913 was still outstanding in the year 1917.

VI. Chile Exploration Company duly paid the tax assessed against it pursuant to the provisions of section 407 of Title IV of the revenue act of 1916 for the period beginning January 1, 1917, and ending June 30, 1917.

VII. During the period from January 1, 1917, to June 30, 1917, both dates inclusive, the activities of the plaintiff, without any omissions or exceptions, consisted solely of the following:

(1) The stockholders of plaintiff held an annual meeting and a special meeting; the directors of plaintiff held various meetings; directors and officers were duly chosen by appropriate action of the stockholders and directors; stock books for the transfer of plaintiff's capital stock were kept; corporate and accounting records were kept

and such other acts performed and expenses paid as were necessary for the maintenance of the corporate existence and organization of the plaintiff; and the plaintiff maintained an office for the purposes of the activities set forth in this paragraph and paid the ordinary and necessary expenses of maintaining such office.

(2) Plaintiff owned and voted by proxy the entire capital
8 stock of said Chile Exploration Company, and thus elected the directors of said Chile Exploration Company, but plaintiff did not act as purchasing or selling agent of said Chile Exploration Company.

(3) Plaintiff had outstanding collateral trust bonds having a par value of $15,000,000 secured by a pledge of the entire capital stock of said Chile Exploration Company. These had been issued in 1913 and the proc eds therefrom had been paid prior to January 1, 1917, to said Chile Exploration Company as an additional investment in said company. During the six months' period ending June 30, 1917, the plaintiff duly paid the interest upon such bonds. On April 1, 1917, by appropriate action of its stockholders and directors, the plaintiff authorized a further issue of collateral trust bonds, to have a par value of $100,000,000 and to be secured by a pledge of the entire capital stock of said Chile Exploration Company and executed a trust agreement under which said bonds were secured, a copy of which is attached hereto and marked "Exhibit A." During the six months ending June 30, 1917, the plaintiff executed an agreement with underwriters, issued part of said authorized bonds having a par value of $35,000,000 as provided for in section 4 of article two of said trust agreement; the plaintiff received payments upon said bonds from subscribers which were deposited in a special account with the Guaranty Trust Company of New York, it paid the expenses of such bond issue out of such special account and made provision for the accrued interest payable upon the bonds.

In said trust agreement the word "company" refers to the plaintiff, and the words "exploration company" refers to said
9 Chile Exploration Company; and said trust agreement specifically provided as follows with reference to the bonds having a par value of $35,000,000, which were actually issued:

"Article Two. Section 4, $35,000,000 principal amount of bonds, which shall be of series A, shall be executed by the company and shall be authenticated and delivered by the trustee for one or more of the following purposes:

"(a) The payment of all floating indebtedness of the company and of the exploration company existing on April 1, 1917, excluding indebtedness upon bills of exchange.

"(b) The acquisition, construction, or improvement (properly chargeable to capital account) after April 1, 1917, of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from deposits in the Province of Antofagasta, Chili, which property upon acquisition

or at the date of construction or improvement will belong to the exploration company or to a subsidiary company.

* * * * * * *

"The company expressly covenants and agrees that it will apply the said $35,000,000 principal amount of bonds, or the proceeds thereof, to one or more of the purposes in this section above set forth and to no other purpose, but the trustee shall be under no obligation to see the application of said bonds or their proceeds."

No part of the proceeds of said bond issue was used to
10 pay the floating indebtedness of said Chile Exploration Company or for the acquisition of property by the plaintiff, but the entire proceeds of said bond issue, after the payment of the expenses incident thereto, were used to pay the floating indebtedness of plaintiff existing on April 1, 1917, together with interest thereon, or were advanced from time to time or held for future advance to said Chile Exploration Company for the purposes specified in said subdivision (b) of section 4 of article two of said trust agreement. Plaintiff has at no time made any issue of bonds other than those specified in this paragraph.

(4) The plaintiff owned certain accounts representing amounts previously loaned to said Chile Exploration Company, and during the six months ending June 30, 1917, it received from said Chile Exploration Company payments of interest upon said loans. It also received from said Chile Exploration Company payments on account of a dividend and interest bearing notes in payment of previous loans and of a portion of the bond discount incurred in marketing said 1917 bond issue and is more particularly shown by Exhibit B hereinafter referred to.

(5) During the six months ending June 30, 1917, plaintiff made loans on open account at interest to said Chile Exploration Company for the limited purposes specified below. The first loan in 1917 was made from money borrowed for that purpose. Later loans were made from the proceeds of said 1917 bond issue. All of said advances were used by Chile Exploration Company as re-
11 quired by subdivision (b) of section 4 of article two of said trust agreement to reimburse itself for expenditures made solely for the acquisition, construction, or improvement (properly chargeable to capital account) of property necessary or useful in connection with the mining, refining, or marketing of copper or of copper ore derived from the mineral deposits owned by said Chile Exploration Company. The Guaranty Trust Company of New York, with whom the proceeds of the 1917 bond issue were deposited on special account, was directed on June 4, 1917, that after honoring checks for the payment of specified floating indebtedness of plaintiff and specified expenses of said 1917 bond issue, it should honor checks on this special account only when accompanied by a letter signed by the president or vice president of the plaintiff stating that the proceeds of such check would be used for one or

more of the purposes specified in subdivision (b) of section 4 of article two of said trust agreement dated April 1, 1917, and plaintiff agreed to furnish and did furnish statements showing the application of the proceeds of such checks to the purposes specified. Such advances were made at the request of Chile Exploration Company when it needed funds for the limited purposes specified, and each check to said Chile Exploration Company on said special account was accompanied by a letter to the Guaranty Trust Company of New York stating that the check was drawn pursuant to the letter of June 4, 1917, and that the proceeds thereof would be used for the purposes specified in subdivision (b) of section 4 of article two of said trust agreement. The total sum advanced to said Chile Exploration Company during the six months ending June 30, 1917, was $1,250,000. The amount charged by that company to construction of plant during this period was $2,438,995.41. The date, amount, and nature of each receipt by plaintiff from, and of
12 each payment by plaintiff to, said Chile Exploration Company during the six months period ending June 30, 1917, are shown in a schedule attached hereto and marked "Exhibit B" and made a part of this complaint.

(6) The assets and liabilities of plaintiff as shown by its books on December 31, 1916, were as stated by the balance sheet for that date, attached hereto and marked "Exhibit C." This is the balance sheet for the close of the last fiscal year of plaintiff ending prior to January 1, 1917.

VIII. The plaintiff on or about February 28, 1917, executed under oath and filed with the collector of internal revenue for the Second District of New York, a return upon official Form No. 707, setting forth the estimated fair value of the plaintiff's capital stock for the fiscal year ended June 30, 1916, and other information, in the manner prescribed by the regulations of the Commissioner of Internal Revenue and the Secretary of the Treasury for corporations subject to the provisions of said section 407 of Title IV of the revenue act of 1916 and the tax thereby imposed; the plaintiff attached to the return so executed and filed, a statement in writing addressed to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the collector for internal revenue for the Second District of New York, setting forth that said return was executed by the plaintiff and filed by it with the said collector of internal revenue under protest and duress. A copy of said return and protest is attached hereto and marked "Exhibit D."

IX. At the time of filing said return as aforesaid the plain-
13 tiff protested as aforesaid to the collector of internal revenue against being required to make said return and against the assessment of any tax based thereon or otherwise, against the plaintiff, under the provisions of said laws and in said written protest (Exhibit D) contended that the plaintiff during the periods aforesaid was engaged solely in representing the interests of a large number of persons in the business of said Chile Exploration Com-

pany (all of whose stock was owned by the plaintiff), that plaintiff existed only for the convenience of such persons in exercising their control as stockholders over said Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company, that the activities of the plaintiff consisted of keeping up its corporate organization, voting the stock of said Chile Exploration Company, receiving dividends upon such stock, and distributing the moneys thus received as dividends among its stockholders, that by reason of said facts plaintiff was not "organized for profit" and was not "carrying on or doing business" within the meaning of section 407 of Title IV of the act of Congress approved September 8, 1916, and that plaintiff was not required by said act of Congress to pay the special excise tax imposed thereby or to render any statement or return or to comply with any regulations of the Secretary of the Treasury or the Commissioner of Internal Revenue prescribed under authority of said act of Congress.

X. The plaintiff executed and filed said return as aforesaid under duress and under coercion of the severe penalties provided by law.

XI. The plaintiff (if its contention as to its liability to said
14 tax under said act of Congress was overruled) would be subject to a penalty equal to fifty per centum of the amount of the tax for refusal to file a return and the plaintiff had no means of securing relief from the risk of incurring such penalty except to file its return as aforesaid under a protest against the filing of such return.

XII. Notwithstanding such protest, the Commissioner of Internal Revenue, purporting to act under the provisions of section 407 of Title IV of the revenue act of 1916, assessed a tax of $21,231.50 against the plaintiff for the period beginning January 1, 1917, and ending June 30, 1917; and the collector of internal revenue of the United States for the Second District of New York, on or about April 7, 1917, notified the plaintiff of said assessment and demanded payment of the said sum of $21,231.50 within ten days.

XIII. The plaintiff on or about April 17, 1917, paid to the defendant the sum of $21,231.50; said payment was made to the defendant under protest and under duress and under coercion of the severe penalties provided by law and under the coercion of the said assessment of the Commissioner of Internal Revenue and the said notice and demand for payment of the tax from the collector of internal revenue of the United States for the Second District of New York.

XIV. The plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a fine of five hundred dollars and to a penalty of five per centum of the tax and interest at the rate of one per centum per month
15 until the tax was paid, for failure to pay the tax, and plaintiff had no means of securing relief from the risk of incurring such fine and penalty except to pay under protest the tax purporting to be assessed against it upon the return filed by it as aforesaid.

XV. On or about September 14, 1918, and within two years from the date of the payment of said tax, and prior to the institution of this action, the plaintiff, pursuant to the laws of the United States and the regulations of the Treasury Department in such cases made and provided, duly appealed to the United States Commissioner of Internal Revenue for the refunding of the amount so paid under protest by the plaintiff for said tax as aforesaid, said refund being requested on the alleged ground that the plaintiff was a holding company whose objects and activities were and are exclusively restricted to holding the stock and securities of Chile Exploration Company and that plaintiff was therefore "not carrying on or doing business" during the period from July 1, 1915, to June 30, 1917, both dates inclusive, and was not subject to the capital stock tax imposed by section 407 of Title IV of the revenue act of 1916 or any other law. Said appeal was thereafter on or about July 16, 1919, denied by said commissioner in the form of a decision in writing rendered by him to the plaintiff.

XVI. By reason of the premises the defendant received said sum of $21,231.50 paid by the plaintiff as aforesaid for the use and benefit of the plaintiff; said sum received by the defendant as aforesaid is still retained by the defendant and said defendant has refused and still refuses to pay the same or any part thereof to the plaintiff, although payment thereof has been duly demanded.

16 For a second cause of action

XVII. The plaintiff repeats and realleges each and every allegation set forth in paragraphs numbered I, II, and IV of the complaint herein, with the same force and effect as if the same were set forth herein in full.

XVIII. This is an action to recover back taxes alleged by the plaintiff to have erroneously and illegally assessed against the plaintiff and paid by it under protest and arising under Title IV, secs. 407–409 of the revenue act of 1916 (39 Stat. 756, 789).

XIX. The plaintiff was organized for the principal purpose of providing a means whereby money could be borrowed from investors in sums sufficiently large to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned it was impracticable for said Chile Exploration Company to borrow such money directly from investors because of said provisions of the law of the Republic of Chile making it impossible for said Chile Exploration Company effectively to mortgage its property as security for loans. Satisfactory security for such loans could be provided, however, by a pledge as collateral security of the capital stock of said Chile Exploration Company. The plaintiff was accordingly organized on or about April 16, 1913, for the principal purpose of holding the capital stock of said Chile Exploration Company and pledging such capital stock as security for bond issues, the proceeds of which should be used, loaned and advanced from time to time to

furnish the necessary capital to develop the mining property
17 of said Chile Exploration Company. At all times hereinafter mentioned the plaintiff has continued to own all of the issued and outstanding capital stock of said Chile Exploration Company. During the year beginning July 1, 1917, and ending June 30, 1918, the plaintiff borrowed money from investors by the receipt of payments on subscriptions to bonds issued on April 1, 1917, under a trust agreement, a copy of which is attached hereto and marked "Exhibit A." By section 4 of article two of said trust agreement, the plaintiff covenanted that the proceeds of such bonds should be used only (a) to pay off certain indebtedness existing on April 1, 1917, and (b) for the acquisition, construction, or improvement (properly chargeable to capital account) after April 1, 1917, of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from property owned by said Chile Exploration Company. In addition to the above a certain other issue of bonds made in the year 1913 was still outstanding in the years 1917 and 1918.

XX. Chile Exploration Company duly paid the taxes assessed against it pursuant to the provisions of section 407 of Title IV of the revenue act of 1916 for the period beginning July 1, 1917, and ending June 30, 1918.

XXI. During the preceding taxable period, to wit: January 1, 1917, to June 30, 1917, the plaintiff's activities were as stated in paragraph VII of this complaint, each and every allegation of which the plaintiff repeats and realleges with the same force and effect as if the same were set forth herein in full.

18 During the period from July 1, 1917, to June 30, 1918, both dates inclusive, the activities of the plaintiff, without any omissions or exceptions, consisted solely of the following:

(1) The stockholders of the plaintiff held an annual meeting; the directors of plaintiff held various meetings; directors and officers were duly chosen by appropriate action of the stockholders and directors; stock books for the transfer of plaintiff's capital stock were kept; corporate and accounting records were kept and such other acts performed and expenses paid as were necessary for the maintenance of the corporate existence and organization of the plaintiff; and the plaintiff maintained an office for the purposes of the activities set forth in this paragraph and paid the ordinary and necessary expenses of maintaining such office.

(2) Plaintiff owned and voted by proxy the entire capital stock of the said Chile Exploration Company and thus elected the directors of said Chile Exploration Company, but plaintiff did not act as purchasing or selling agent of said Chile Exploration Company.

(3) Plaintiff had outstanding collateral trust bonds having a par value of $15,000,000 secured by a pledge of the entire capital stock of said Chile Exploration Company. These bonds had been issued in 1913 and the proceeds therefrom had been paid prior to January

1, 1917, to said Chile Exploration Company as an additional investment in said company. During the year ending June 30, 1918, the plaintiff duly paid the interest upon said bonds. The plaintiff also had outstanding collateral trust bonds having a par value of
19 $35,000,000 which had been issued on April 1, 1917, which had been paid for in part only by subscribers, and during the year ending June 30, 1918, the plaintiff received further payments thereon from subscribers, and duly paid the interest upon such bonds. The limited purposes for which the proceeds of said 1917 bond issue could be used under said trust agreement (Exhibit A) and the limited purposes for which such proceeds were used are set forth in said Paragraph VII of this complaint.

(4) The plaintiff owned certain accounts and notes representing amounts previously loaned by it to said Chile Exploration Company, and during the year ending June 30, 1918, it received from said Chile Exploration Company payments of interest on such notes and loans and payments on account of a dividend, as is more particularly shown by Exhibit B.

(5) During the year ending June 30, 1918, plaintiff made loans on open account at interest to said Chile Exploration Company for the limited purposes specified below. Such loans were made from the proceeds of said 1917 bond issue. All of such advances were used by Chile Exploration Company as required by subdivision (b) of section 4 of article two of said trust agreement to reimburse itself for expenditures made solely for the acquisition, construction or improvement (properly chargeable to capital account) of property necessary or useful in connection with the mining, refining or marketing of copper, or of copper ore derived from the mineral deposits owned by said Chile Exploration Company. The Guaranty Trust Com-
20 pany of New York, with whom the proceeds of the 1917 bond issue were deposited on special account, was directed on June 4, 1917, that after honoring checks for the payment of specified floating indebtedness of plaintiff and specified expenses of said 1917 bond issue, it should honor checks on this special account only when accompanied by a letter signed by the president or vice president of the plaintiff stating that the proceeds of such check would be used for one or more of the purposes specified in subdivision (b) of section 4 of article two of said trust agreement dated April 1, 1917, and plaintiff agreed to furnish and did furnish statements showing the application of the proceeds of such checks to the purposes specified. Such advances were made at the request of Chile Exploration Company, when it needed funds for the limited purposes specified, and each check to said Chile Exploration Company on said special account was accompanied by a letter to the Guaranty Trust Company of New York stating that the check was drawn pursuant to the letter of June 4, 1917, and that the proceeds thereof would be used for the purposes specified in subdivision (b) of Section 4 of article two of said trust agreement. The total sum advanced to said Chile Ex-

ploration Company during the year ending June 30, 1918, was $3,500,000. The amount charged by that company to construction of plant during this period was $4,063,735.62. The date, amount and nature of each receipt by the plaintiff from, and of each payment by plaintiff to, said Chile Exploration Company during the year ending June 30, 1918, are shown in a schedule attached hereto and marked "Exhibit B" and made a part of this complaint.

(6) During the year ending June 30, 1918, the plaintiff borrowed from Guggenheim Brothers, a partnership and repaid to them with interest a single loan of $500,000.

(7) The assets and liabilities of the plaintiff as shown by its books on December 31, 1916, were as stated on the balance sheet for that date attached hereto and marked "Exhibit C." This is the balance sheet for the close of the last fiscal year of plaintiff ending prior to July 1, 1917.

XXII. Plaintiff, on or about August 31, 1917, executed under oath and filed with the collector of internal revenue for the Second District of New York a return upon official Form No. 707, setting forth the estimated fair value of the plaintiff's capital stock for the fiscal year ended June 30, 1917, and other information in the manner prescribed by the regulations of the Commissioner of Internal Revenue and the Secretary of the Treasury for corporations subject to the provisions of section 407 of Title IV of the revenue act of 1916 and the tax thereby imposed; plaintiff attached to the return so executed and filed a statement in writing addressed to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the collector of internal revenue for the Second District of New York, setting forth that said return was executed by the plaintiff and filed by it with the said collector of internal revenue under protest and duress. A copy of said return and protest is attached hereto and marked "Exhibit E."

XXIII. At the time of filing said return as aforesaid the plaintiff protested as aforesaid to the collector of internal revenue against being required to make said return and against the assessment
22 of any tax based thereon or otherwise, against the plaintiff, under the provisions of said laws and in said written protest (Exhibit E) contended that the plaintiff during the periods aforesaid was engaged solely in representing the interests of a large number of persons in the business of said Chile Exploration Company (all of whose stock was owned by the plaintiff), that plaintiff existed only for the convenience of such persons in exercising their control as stockholders over said Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company, that the activities of the plaintiff consisted of keeping up its corporate organization, voting the stock of said Chile Exploration Company, receiving dividends upon such stock and distributing the moneys thus received as dividends among its stockholders, that by reason of said facts plaintiff was not "organized for profit" and was not "carrying on or doing business" within

the meaning of section 407 of Title IV of the act of Congress approved September 8, 1916, and that plaintiff was not required by said act of Congress to pay the special excise tax imposed thereby or to render any statement or return or to comply with any regulations of the Secretary of the Treasury or the Commissioner of Internal Revenue prescribed under authority of said act of Congress.

XXIV. The plaintiff executed and filed said return as aforesaid under duress and under coercion of the severe penalties provided by law.

XXV. The plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a penalty equal to fifty per centum of the amount of the tax for
23 refusal to file a return and the plaintiff had no means of securing relief from the risk of incurring such penalty except to file its return as aforesaid under a protest against the filing of such return.

XXVI. Notwithstanding such protest, the Commissioner of Internal Revenue, purporting to act under the provisions of section 407 of Title IV of the revenue act of 1916, assessed a tax of $44,676.50 against the plaintiff for the period beginning July 1, 1917, and ending June 30, 1918, and the collector of internal revenue of the United States for the Second District of New York, on or about October 24, 1917, notified plaintiff of said assessment and demanded payment of the said sum of $44,676.50 within ten days.

XXVII. The plaintiff on or about October 31, 1917 paid to the defendant the sum of $44,676.50; said payment was made by the plaintiff under protest and under duress and under coercion of the severe penalties provided by law and under the coercion of the assessment of the Commissioner of Internal Revenue and the said notice and demand for payment of the tax from the collector of internal revenue of the United States for the Second District of New York.

XXVIII. The plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a fine of five hundred dollars and to a penalty of five per centum of the tax and interest at the rate of one per centum per month until the tax was paid, for failure to pay the tax, and plaintiff had no means for securing relief from the risk of incurring such fine and penalty except to pay under protest the tax purporting to be assessed against it upon the return filed by it as aforesaid.

24 XXIX. On or about September 14, 1918, and within two years from the date of the payment of said tax, and prior to the institution of this action, the plaintiff, pursuant to the laws of the United States and the regulations of the Treasury Department in such cases made and provided, duly appealed to the United States Commissioner of Internal Revenue for the refunding of the amount so paid under protest by the plaintiff for said tax as aforesaid, said refund being requested on the alleged ground that the plaintiff was a holding company whose objects and activities were

and are exclusively restricted to holding the stock and securities of Chile Exploration Company and that plaintiff was therefore "not carrying on or doing business" during the period from January 1, 1916 to June 30, 1918, both dates inclusive, and was not subject to the capital stock tax imposed by section 407 of Title IV of the revenue act of 1916 or any other law. Said appeal was thereafter, on or about July 16, 1919, denied by said commissioner in the form of a decision in writing rendered by him to the plaintiff.

XXX. By reason of the premises the defendant received the sum of $44,676.50 paid by the plaintiff as aforesaid for the use and benefit of the plaintiff, and said sum received by the defendant as aforesaid is still retained by the defendant and said defendant has refused and still refuses to pay the same or any part thereof to the plaintiff, although payment thereof has been duly demanded.

For a third cause of action

XXXI. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs I, II and IV of the complaint herein, with the same force and effect as if the same were set forth herein in full.

XXXII. This is an action to recover back taxes alleged by the plaintiff to have been erroneously and illegally assessed against the plaintiff and paid by it under protest and arising under Title X, sec. 1000 of the revenue act of 1918 (40 Stat. 1051, 1126).

XXXIII. The plaintiff was organized for the principal purpose of providing a means whereby money could be borrowed from investors in sums sufficiently large to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned it was impracticable for said Chile Exploration Company to borrow such money directly from investors because of said provisions of the laws of the Republic of Chile making it impossible for said Chile Exploration Company effectively to mortgage its property as security for loans. Satisfactory security for such loans could be provided, however, by a pledge as collateral security of the capital stock of said Chile Exploration Company. The plaintiff was accordingly organized on or about April 16, 1913, for the principal purpose of holding the capital stock of said Chile Exploration Company and pledging such capital stock as security for bond issues, the proceeds of which should be used, loaned, and advanced from time to time to furnish the necessary capital to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned the plaintiff has continued to own all of the issued and outstanding capital stock of the said Chile Exploration Company.
26 During the period beginning July 1, 1918, and ending June 30, 1919, the plaintiff borrowed money from investors by the receipt of subscriptions on bonds theretofore issued on April 1, 1917, under a trust agreement, a copy of which is attached hereto and marked "Exhibit A." By section 4 of article two of said trust agreement, the plaintiff covenanted that the proceeds of said bonds

should be used only (a) to pay off certain indebtedness existing on April 1, 1917, and (b) for the acquisition, construction, or improvement (properly chargeable to capital account) after April 1, 1917, of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from the property owned by said Chile Exploration Company. In addition to the above, a certain other issue of bonds made in the year 1913 was still outstanding in the years 1918 and 1919.

XXXIV. Chile Exploration Company duly paid the tax assessed against it pursuant to the provisions of section 1000 of Title X of the revenue act of 1918 for the period beginning July 1, 1918, and ending June 30, 1919.

XXXV. During the preceding taxable year, to wit, July 1, 1917, to June 30, 1918, the plaintiff's activities were as stated in Paragraph XXI of this complaint, each and every allegation of which the plaintiff repeats and realleges with the same force and effect as if the same were set forth herein in full.

During the period from July 1, 1918, to June 30, 1919, both dates inclusive, the activities of the plaintiff, without any omissions or exceptions, consisted solely of the following:

27 (1) The stockholders of plaintiff held an annual meeting; the directors of plaintiff held various meetings; directors and officers were duly chosen by appropriate action of the stockholders and directors; stock books for the transfer of plaintiff's capital stock were kept; corporate and accounting records were kept and such other acts performed and expenses paid as were necessary for the maintenance of the corporate existence and organization of the plaintiff; and the plaintiff maintained an office for the purpose of the activities set forth in this paragraph and paid the ordinary and necessary expenses of maintaining such office.

(2) Plaintiff owned and voted by proxy the entire capital stock of said Chile Exploration Company and thus elected the directors of said Chile Exploration Company, but plaintiff did not act as purchasing or selling agent of said Chile Exploration Company.

(3) Plaintiff had outstanding collateral trust bonds having a par value of $15,000,000 secured by a pledge of the entire capital stock of said Chile Exploration Company. These bonds had been issued in 1913 and the proceeds therefrom had been paid prior to January 1, 1917, to said Chile Exploration Company as an additional investment in said company. During the year ending June 30, 1919, the plaintiff duly paid the interest upon such bonds. The plaintiff also had outstanding collateral trust bonds having a par value of $35,000,000 which had been issued on April 1, 1917, which had been paid for in part only by subscribers, and the plaintiff received further payments thereon from subscribers and duly paid the interest upon such bonds. The limited purposes for which the

28 proceeds of said 1917 bond issue could be used under said trust agreement, and the limited purposes for which such proceeds were used, are set forth in Paragraph VII of this com-

plaint, each and every allegation of which the plaintiff repeats and realleges with the same force and effect as if the same were set forth herein in full.

(4) The plaintiff owned certain accounts and notes representing amounts previously loaned to said Chile Exploration Company and during the year ending June 30, 1919, it received from said Chile Exploration Company a single payment of interest upon such loans and notes and payments on account of a dividend as is more particularly shown by Exhibit F hereinafter referred to.

(5) During the year ending June 30, 1919, plaintiff made loans on open account at interest to said Chile Exploration Company for the limited purposes specified below. Such loans were made from the proceeds of said 1917 bond issue. All of said advances were used by Chile Exploration Company, as required by subdivision (b) of section 4 of article two of said trust agreement, to reimburse itself for expenditures made solely for the acquisition, construction or improvement (properly chargeable to capital account) of property necessary or useful in connection with the mining, refining, or marketing of copper or of copper ore derived from the mineral deposits owned by said Chile Exploration Company. The Guaranty Trust Company of New York, with whom the proceeds of the 1917 bond issue were deposited on special account, was directed on June 4, 1917, that after honoring checks for the payment of specified floating indebtedness of plaintiff and specified expenses of said 1917 bond issue, it should honor checks on this special account
29 only when accompanied by a letter signed by the president or vice president of the plaintiff stating that the proceeds of such check would be used for one or more of the purposes specified in subdivision (b) of section 4 of article two of said trust agreement dated April 1, 1917, and plaintiff agreed to furnish, and did furnish, statements showing the application of the proceeds of such checks to the purposes specified. Such advances were made at the request of Chile Exploration Company when it needed funds for the limited purposes specified and each check to said Chile Exploration Company on said special account was accompanied by a letter to the Guaranty Trust Company of New York stating that the check was drawn pursuant to the letter of June 4, 1917, and that the proceeds thereof would be used for the purposes specified in subdivision (b) of section 4 of article two of said trust agreement. The total sum advanced to said Chile Exploration Company during the year ending June 30, 1919, was $7,136,000. The amount charged by that company to construction of plant during this period was $7,920,959.12. The date, amount, and nature of each receipt by plaintiff from, and of each payment by plaintiff to said Chile Exploration Company during the year ending June 30, 1919, are shown in a schedule attached hereto and marked "Exhibit F" and made a part of this complaint.

(6) The plaintiff had certain surplus funds received from said 1917 bond issue which were in excess of the amounts which it was deemed proper and expedient to advance during said period to said Chile Exploration Company for the limited purposes specified in said subdivision (b), section 4, article two of said trust agreement, by which said 1917 bond issue was secured. A portion of
30 such funds was invested by plaintiff in Liberty bonds and United States certificates of indebtedness. The major portion of such funds was on deposit with the Guaranty Trust Company of New York, a corporation. The plaintiff authorized said Guaranty Trust Company of New York to make loans out of such funds for the account and risk of the plaintiff. Such loans were demand loans, commonly known as "call loans," which were secured by collateral and which yielded a higher rate of interest than that paid upon bank deposits. The Guaranty Trust Company of New York attended to all details in connection with the making and calling of such loans and the deposit of collateral security. Plaintiff was currently advised of the names of all borrowers, the amount loaned to each and the collateral security deposited by each with said Guaranty Trust Company of New York. If the collateral security or the borrower was not satisfactory, plaintiff notified said Guaranty Trust Company of New York to call the loan.

The maximum amount of said call loans during the year ending June 30, 1919, was $5,000,000. Attached hereto and marked "Exhibit G" is a statement showing the monthly debit balances in the call loan account on plaintiff's books during the year ending June 30, 1919. On information and belief, the records of said Guaranty Trust Company of New York show that during the year ending June 30, 1919, one hundred forty-one loans, aggregating $26,045,000, were made and one hundred thirty-five loans aggregating $25,045,000 were called or paid. Attached hereto and marked "Exhibit H" is a statement for the year ending June 30, 1919, showing by months the number of loans made and the aggregate amount
31 thereof and the number of loans called and the aggregate amount thereof. Plaintiff is informed and believes that "Exhibit H" is in accordance with the records of said Guaranty Trust Company of New York. During the year ending June 30, 1919, the plaintiff received $194,579.20 interest on said call loans. Attached hereto and marked "Exhibit I" is a schedule showing by months the amount of interest so received.

(7) The assets and liabilities of the plaintiff as shown by its books on December 31, 1917, were as stated on Exhibit A of the return for the taxable period ending June 30, 1919, a copy of which is attached hereto and marked "Exhibit J." This is the balance sheet for the close of the last fiscal year of plaintiff ending prior to July 1, 1918.

XXXVI. The plaintiff on or about September 30, 1918, executed under oath and filed under protest and duress with the collector o

internal revenue for the Second District of New York, a return for special excise tax, attaching to said return the following statement:

"The Chile Copper Company is a holding company, whose objects and activities are exclusively restricted to holding the stocks and securities of Chile Exploration Company, a corporation organized under the laws of the State of New Jersey.

"Under Articles 5 and 6 of regulations number 38 (revised), relating to the capital stock tax, this company is not 'carrying on or doing business' and never has carried on or done business within the meaning of the law."

XXXVII. Thereafter in response to a written demand from
32 the Commissioner of Internal Revenue, the plaintiff on or about August 25, 1919, executed under oath and filed with the collector of internal revenue for the Second District of New York, a return upon official Form No. 707, setting forth the estimated fair value of the plaintiff's capital stock for the fiscal year ended December 31, 1917, and other information in the manner prescribed by the regulations of the Commissioner of Internal Revenue and the Secretary of the Treasury for corporations subject to the provisions of section 1000 of Title X of the revenue act of 1918, and the tax thereby imposed; plaintiff attached to the return so executed and filed, a statement in writing addressed to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the collector of internal revenue for the Second District of New York, setting forth that said return was executed by the plaintiff and filed by it with the said collector of internal revenue under protest and duress. A copy of said return and protest is attached hereto and marked "Exhibit J."

XXXVIII. At the time of filing said return as aforesaid the plaintiff protested as aforesaid to the collector of internal revenue against being required to make said return and against the assessment of any tax based thereon or otherwise, against the plaintiff, under the provisions of said laws, and in said written protest (Exhibit J) contended that the plaintiff during the periods aforesaid was engaged solely in representing the interests of a large number of persons in the business of said Chile Exploration Company (all of whose stock was owned by the plaintiff), that plaintiff existed only for the convenience of such persons in exercising their control
33 as stockholders over said Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company, that the activities of the plaintiff consisted of keeping up its corporate organization, voting the stock of said Chile Exploration Company, receiving dividends upon such stock and distributing the moneys thus received as dividends among its stockholders, that by reason of said facts plaintiff was not "carrying on or doing business" within the meaning of said act of Congress, and that plaintiff was not required by said act of Congress to pay the special excise tax imposed thereby or to render any statement or return or to comply with any regulations of the Secretary of the Treasury

or the Commissioner of Internal Revenue prescribed under authority of said act of Congress.

XXXIX. The plaintiff executed and filed said return as aforesaid under duress and under coercion of the severe penalties provided by law.

XL. Plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a penalty equal to twenty-five per centum of the amount of the tax for failure to file the return and the plaintiff had no means of securing relief from the risk of incurring such penalty except to file its returns, as aforesaid, under a protest against the filing of such returns.

XLI. Notwithstanding such protest, the Commissioner of Internal Revenue, purporting to act under the provisions of section 1000 of Title X of the revenue act of 1918, assessed a tax of $76,375.00 against the plaintiff for the period beginning July 1, 1918, and ending June 30, 1919, and the collector of internal revenue of the
34 United States for the Second District of New York, on or about December 1, 1919, notified the plaintiff of said assessment and demanded payment of the said sum of $76,375.00 within ten days.

XLII. On or about December 8, 1919, the plaintiff, pursuant to the laws of the United States and the regulations of the Treasury Department in such cases made and provided, filed with the defendant for transmission to the United States Commissioner of Internal Revenue, a claim for abatement of said assessment, said abatement being requested on the alleged ground that the plaintiff was a holding company whose objects and activities were exclusively restricted to holding the stock and securities of Chile Exploration Company, and that it was therefore not "carrying on or doing business" during the period beginning January 1, 1917, and ending June 30, 1919; such claim for abatement was, thereafter, on or about April 9, 1920, denied by said commissioner in the form of a decision in writing rendered by him to the plaintiff.

XLIII. Thereafter, on or about April 7, 1920, the defendant again notified the plaintiff of said assessment and demanded payment within ten days of the said sum of $76,375, together with interest thereon at the rate of one per cent per month for four months, amounting to $3,055.00, a total of $79,430.00.

XLIV. The plaintiff on or about April 27, 1920, paid to the defendant the sum of $79,430.00 in payment of said tax and interest; said payment was made to the defendant under protest and under duress and under coercion of the severe penalties
35 provided by law and under the coercion of the said assessment of the Commissioner of Internal Revenue and the said notice and demand for payment of the tax from the defendant.

XLV. The plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a fine of one thousand dollars for doing business without payment of the tax, to a fine of ten thousand dollars for wilful refusal to pay the

tax, and to a penalty of five per centum of the tax, and interest at the rate of one per centum per month until the tax was paid, for failure to pay the tax on time, and the plaintiff's officers and employees would be subject to other severe fines and penalties, and the plaintiff had no means of securing relief from the risk of incurring such fines and penalties except to pay under protest the tax purporting to be assessed against it upon the returns filed by it, as aforesaid.

XLVI. On or about April 30, 1920, and within two years from the date of the payment of said tax, and prior to the institution of this action, the plaintiff, pursuant to the laws of the United States and the regulations of the Treasury Department in such cases made and provided, duly appealed to the United States Commissioner of Internal Revenue for refunding of the amount so paid under protest by the plaintiff for said tax as aforesaid, said refund being requested on the alleged ground that the plaintiff was a holding company whose objects and activities were and are exclusively restricted to holding the stock and securities of Chile Exploration Company and that plaintiff was therefore "not carrying on or doing business"
36 during the period from January 1, 1917, to June 30, 1919, both dates inclusive, and was not subject to the capital stock tax imposed by section 407 of Title IV of the revenue act of 1916, or by section 1000 of Title X of the revenue act of 1918. Said appeal was thereafter, on or about May 27, 1920, denied by said commissioner in the form of a decision in writing rendered by him to the plaintiff.

XLVII. By reason of the premises, the defendant received said sum of $79,430.00 paid by the plaintiff, as aforesaid, for the use and benefit of the plaintiff, and said sum received by the defendant as aforesaid, is still retained by the defendant, and said defendant has refused to pay the same or any part thereof to the plaintiff, although payment thereof has been duly demanded.

For a fourth cause of action

XLVIII. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs I, II, and IV of the complaint herein, with the same force and effect as if the same were set forth herein in full.

XLIX. This is an action to recover back taxes alleged by the plaintiff to have been erroneously and illegally assessed against the plaintiff and paid by it under protest and arising under Title X, sec. 1000 of the revenue act of 1918 (40 Stat. 1057, 1126).

L. The plaintiff was organized for the principal purpose of providing a means whereby money could be borrowed from investors in sums
37 sufficiently large to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned it was impracticable for said Chile Exploration Company to borrow such money directly from investors because of said provisions of the laws of the Republic of Chile making it impossible for said Chile Exploration Company effectively to mortgage its property

as security for loans. Satisfactory security for such loans could be provided, however, by a pledge as collateral security of the stock of said Chile Exploration Company. The plaintiff was accordingly organized on or about April 16, 1913, for the principal purpose of holding the capital stock of said Chile Exploration Company and pledging such capital stock as security for bond issues, the proceeds of which should be used, loaned, and advanced from time to time to furnish the necessary capital to develop the mining property of said Chile Exploration Company. At all times hereinafter mentioned, the plaintiff has continued to own all of the issued and outstanding capital stock of said Chile Exploration Company. During the period beginning July 1st, 1919, and ending June 30th, 1920, the plaintiff borrowed money from investors by the issuance of bonds under a trust agreement, a copy of which is attached hereto and marked "Exhibit A." By section 4 of article two of said trust agreement, the plaintiff covenanted that the proceeds of the bonds issued as series A, which are the only bonds which have been issued thereunder, should be used only (a) to pay off certain indebtedness existing on April 1st, 1917, and (b) for the acquisition, construction, or improvement (properly chargeable to capital account), after April 1st, 1917, of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from property owned by said Chile Exploration Company. In addition to the above a certain other issue of bonds made in the year 1913 was still outstanding in the years 1919 and 1920.

38

LI. Chile Exploration Company duly paid the tax-assessed against it pursuant to the provisions of section 1000 of Title X of the revenue act of 1918, for the period beginning July 1, 1919, to June 30, 1920.

LII. During the preceding taxable year, to wit: July 1st, 1918, to June 30th, 1919, the plaintiff's activities were as stated in Paragraph XXXV of this complaint, each and every allegation of which the plaintiff repeats and realleges with the same force and effect as if the same were set forth herein in full.

During the period from July 1, 1919, to June 30, 1920, both dates inclusive, the activities of the plaintiff without any omissions or exceptions consisted solely of the following:

(1) The stockholders of plaintiff held an annual meeting; the directors of plaintiff held various meetings; directors and officers were duly chosen by appropriate action of the stockholders and directors; stock books for the transfer of plaintiff's capital stock were kept; corporate and accounting records were kept and such other acts performed and expenses paid as were necessary for the maintenance of the corporate existence and organization of the plaintiff; and the plaintiff maintained an office for the purpose of the activities set forth in this paragraph and paid the ordinary and necessary expenses of maintaining such office.

(2) Plaintiff owned and voted by proxy the entire capital
39 stock of said Chile Exploration Company and thus elected the directors of said Chile Exploration Company, but plaintiff did not act as purchasing or selling agent of said Chile Exploration Company.

(3) Plaintiff had outstanding collateral trust bonds having a par value of $15,000,000 secured by a pledge of the entire capital stock of said Chile Exploration Company. These bonds had been issued in 1913 and the proceeds therefrom had been paid prior to January 1, 1917, to said Chile Exploration Company as an additional investment in said company. During the year ending June 30, 1919, the plaintiff duly paid the interest upon such bonds. The plaintiff also had outstanding collateral trust bonds having a par value of $35,000,000 which had been issued on April 1, 1917, which had been paid for in part only by subscribers, and the plaintiff received further payments thereon from subscribers and duly paid the interest upon such bonds. The limited purposes for which the proceeds of said 1917 issue could be used under said trust agreement and the limited purposes for which such proceeds were used are set forth in Paragraph VII of this complaint, each and every allegation of which the plaintiff repeats and realleges with the same force and effect as if the same were set forth herein in full.

(4) The plaintiff owned certain accounts and notes representing amounts previously loaned to said Chile Exploration Company and during the year ending June 30, 1920, it received from said Chile Exploration Company payments of interest upon such notes and loans and payments of principal upon such loans, as is more particularly shown by Exhibit K hereinafter referred to.

40 (5) During the year ending June 30, 1920, plaintiff made loans on open account at interest, to said Chile Exploration Company for the limited purposes specified below. Such loans were made from the proceeds of said 1917 bond issue. All of said advances were used by Chile Exploration Company, as required by subdivision (b) of section 4 of article two of said trust agreement, to reimburse itself for expenditures made solely for the acquisition, construction, or improvement (properly chargeable to capital account) of property necessary or useful in connection with the mining, refining, or marketing of copper or of copper ore derived from the mineral deposits owned by said Chile Exploration Company. The Guaranty Trust Company of New York, with whom the proceeds of the 1917 bond issue were deposited on special account, was directed on June 4, 1917, that after honoring checks for the payment of specified floating indebtedness of plaintiff and specified expenses of said 1917 bond issue, it should honor checks on this special account only when accompanied by a letter signed by the president or vice president of the plaintiff stating that the proceeds of such check would be used for one or more of the purposes specified

in subdivision (b), section 4, article two of said trust agreement dated April 1, 1917, and plaintiff agreed to furnish and did furnish statements showing the application of the proceeds of such checks to the purposes specified. Such advances were made at the request of Chile Exploration Company when it needed funds for the limited purposes specified and each check to said exploration company on said special account was accompanied by a letter to the Guaranty Trust Company of New York stating that the check was
41 drawn pursuant to the letter of June 4, 1917, and that the proceeds thereof would be used for the purposes specified in subdivision (b) of section 4 of article two of said trust agreement. The total sum advanced to said Chile Exploration Company during the year ending June 30, 1920, was $700,000. The amount charged by that company to construction of plant during this period was $2,812,755.35. The date, amount, and nature of each receipt by plaintiff from, and of each payment by plaintiff to, said Chile Exploration Company during the year ending June 30, 1920, are shown in a schedule attached hereto and marked "Exhibit K" and made a part of this complaint.

(6) The plaintiff had certain surplus funds received from said 1917 bond issue which were in excess of the amounts which it was deemed proper and expedient to advance during said period, to said Chile Exploration Company for the limited purposes specified in said subdivision (b), section 4, article two of said trust agreement, by which said 1917 bond issue was secured. A portion of such funds was invested by plaintiff in Liberty bonds. The major portion of such funds was on deposit with the Guaranty Trust Company of New York, a corporation, or with the Central Union Trust Company, a corporation. The plaintiff authorized the said Guaranty Trust Company of New York and said Central Union Trust Company to make loans out of such funds for the account and risk of the plaintiff. Such loans were demand loans, commonly known as "call loans" which were secured by collateral and which yielded a higher rate of interest than that paid upon bank deposits. The Guaranty Trust Company of New York and the Central Union Trust Company attended to all the details in connection with
42 the making and calling of such loans and the deposit of collateral security. The plaintiff was currently advised of the names of all borrowers, the amount loaned to each and the collateral security deposited by each with said Guaranty Trust Company of New York or said Central Union Trust Company. If the collateral security or the borrower was not satisfactory, plaintiff notified said Guaranty Trust Company of New York for said Centra Union Trust Company to call the loan.

The maximum amount of said call loans during the year ending June 30, 1920, was $9,100,000. Attached hereto and marked "Exhibit L" is a statement showing the monthly debit balances in the

call loan account on plaintiff's books during the year ending June 30, 1920. On information and belief the records of said Guaranty Trust Company of New York and of said Central Union Trust Company show that during the year ending June 30, 1920, 224 loans aggregating $37,200,000 were made and 180 loans aggregating $29,100,000 were called or paid. Attached hereto and marked "Exhibit M" is a statement for the year ending June 30, 1920, showing by months the number of loans made and the aggregate amount thereof and the number of loans called and the aggregate amount thereof. Plaintiff is informed and believes that Exhibit M is in accordance with the records of said Guaranty Trust Company of New York and said Central Union Trust Company. During the year ending June 30, 1920, the plaintiff received $332,366.90 interest on said call loans. Attached hereto and marked "Exhibit N" is a schedule showing by months the amount of interest so received.

(7) The assets and liabilities of the plaintiff as shown by
43 its books on December 31, 1918 were as stated on "Exhibit A" of the return for the taxable period ending June 30, 1920, a copy of which is attached hereto and marked "Exhibit O." This is the balance sheet for the close of the last fiscal year of plaintiff ending prior to July 1, 1919.

LIII. The plaintiff, on or about July 31, 1919, executed under oath and filed with the collector of internal revenue for the second district of New York, a return upon official Form No. 707, setting forth the estimated fair value of the plaintiff's capital stock for the fiscal year ended December 31, 1918, and other information, in the manner prescribed by the regulations of the Commissioner of Internal Revenue and the Secretary of the Treasury for corporations subject to the provisions of section 1,000, Title X, of the revenue act of 1918, and the tax thereby imposed; the plaintiff attached to the return so executed and filed a statement in writing addressed to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the collector of internal revenue for the second district of New York, setting forth that said return was executed by the plaintiff and filed by it with the said collector of internal revenue under protest and duress. A copy of said return and protest is attached hereto and marked "Exhibit O."

LIV. At the time of filing said return, as aforesaid, the plaintiff protested, as aforesaid, to the collector of internal revenue against being required to make said return and against the assessment of any tax based thereon or otherwise, against the plaintiff, under the provisions of Title X of the revenue act of 1918, and in said writ-
44 ten protest (Exhibit O) contended that the plaintiff during the period beginning January 1, 1919, and ending June 30, 1920, was engaged solely in representing the interests of a large number of persons in the business of said Chile Exploration Company, all of whose stock was owned by the plaintiff; plaintiff existed only for

the convenience of such persons, in exercising their control as stockholders over said Chile Exploration Company, and receiving profits arising from the business of said Chile Exploration Company; the activities of the plaintiff consisted of keeping up its corporate organization, voting the stock of said Chile Exploration Company, receiving dividends upon such stock and distributing the moneys thus received as dividends among its own stockholders; by reason of said facts, plaintiff was not "carrying on or doing business" within the meaning of Title X of the revenue act of 1918, and that the plaintiff was not required by said act to pay a special excise tax imposed thereby or to render any statement or return or to comply with any regulations of the Secretary of the Treasury or the Commissioner of Internal Revenue, prescribed under authority of said act of Congress.

LV. The plaintiff executed and filed said return as aforesaid under duress and under coercion of the severe penalties provided by law.

LVI. Plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a penalty equal to twenty-five per centum of the amount of the tax for failure to file the return and the plaintiff had no means of securing relief from the risk of incurring such penalty except to file its returns, as aforesaid, under a protest against the filing of such returns.

45 LVII. Notwithstanding such protest, the Commissioner of Internal Revenue, purporting to act under the provisions of section 1,000 of Title X of the revenue act of 1918, assessed a tax of $65,241.00 against the plaintiff for the period beginning July 1, 1919, and ending June 30, 1920, and the collector of internal revenue of the United States for the Second District of New York, on or about December 1, 1919, notified the plaintiff of said assessment and demanded payment of the said sum of $65,241.00 within ten days.

LVIII. On or about December 8, 1919, the plaintiff, pursuant to the laws of the United States and regulations of the Treasury Department in such cases made and provided, filed with the defendant for transmission to the United States Commissioner of Internal Revenue, a claim for abatement of said assessment, said abatement being requested on the alleged ground that the plaintiff was a holding company whose objects and activities were exclusively restricted to holding the stock and securities of Chile Exploration Company, and that it was therefore not "carrying on or doing business" during the period beginning July 1, 1918, and ending June 30, 1920; such claim for abatement was, thereafter, on or about April 9, 1920, denied by said commissioner in the form of a decision in writing rendered by him to the plaintiff.

LIX. Thereafter, on or about April 7, 1920, the defendant again notified the plaintiff of said assessment and demanded payment within ten days of the said sum of $65,241.00, together with interest

thereon at the rate of one per cent per month for four months, amounting to $2,609.64, a total of $67,850.64.

46 LX. The plaintiff on or about April 27, 1920, paid to the defendant the sum of $67,850.64 in payment of said tax and interest; said payment was made to the defendant under protest and under duress and under coercion of the severe penalties provided by law and under the coercion of the said assessment of the Commissioner of Internal Revenue and the said notice and demand for payment of the tax, from the defendant.

LXI. The plaintiff (if its contention as to its liability to said tax under said act of Congress was overruled) would be subject to a fine of one thousand dollars for doing business without payment of the tax, to a fine of ten thousand dollars for willful refusal to pay the tax, and to a penalty of five per centum of the tax, and interest at the rate of one per centum per month until the tax was paid, for failure to pay the tax on time, and the plaintiff's officers and employees would be subject to other severe fines and penalties, and the plaintiff had no means of securing relief from the risk of incurring such fines and penalties except to pay under protest the tax purporting to be assessed against it upon the returns filed by it, as aforesaid.

LXII. On or about April 30, 1920, and within two years from the date of the payment of said tax, and prior to the institution of this action, the plaintiff, pursuant to the laws of the United States and the regulations of the Treasury Department in such cases made and provided, duly appealed to the United States Commissioner of Internal Revenue for the refunding of the amount so paid under protest by the plaintiff for said tax as aforesaid, said refund

47 being requested on the alleged ground that the plaintiff was a holding company whose objects and activities were and are exclusively restricted to holding the stock and securities of Chile Exploration Company and that plaintiff was therefore "not carrying on or doing business" during the period from July 1, 1918, to June 30, 1920, both dates inclusive, and was not subject to the capital stock tax imposed by section 407 of Title IV of the revenue act of 1916, or by section 1,000 of Title X of the revenue act of 1918. Said appeal was thereafter, on or about May 27, 1920, denied by said commissioner in the form of a decision in writing rendered by him to the plaintiff.

LXIII. By reason of the premises, the defendant received said sum of $67,850.64 paid by the plaintiff, as aforesaid, for the use and benefit of the plaintiff, and said sum received by the defendant, as aforesaid, is still retained by the defendant, and said defendant has refused to pay the same or any part thereof to the plaintiff, although payment thereof has been duly demanded.

WHEREFORE plaintiff demands judgment against the defendant for the sum of $213,188.64, with interest as follows: On $21,231.50 from the 17th day of April, 1917; on $44,676.50 from the 31st day

of October, 1917; on $79,430.00 from the 27th day of April, 1920, and on $67,850.64 from the 27th day of April, 1920, together with the costs and disbursements of this action.

ROOT, CLARK, BUCKNER & HOWLAND,
Attorneys for Plaintiff.

Office and post-office address, 31 Nassau Street, Borough of Manhattan, New York City.

48 STATE OF NEW YORK,
County of New York, ss:

William E. Bennett, being duly sworn, deposes and says: That he is the secretary of Chile Copper Company, the plaintiff in the above-entitled action. That he has read the foregoing complaint and knows the contents thereof and the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the plaintiff and is made by deponent is that the plaintiff is a foreign corporation. That the sources of deponent's information and the grounds of his belief as to all matters not therein stated upon his knowledge are statements and reports of other officers and employees of the plaintiff corporation, and statements and reports of the attorneys for the plaintiff and documents and correspondence in the possession of deponent.

WILLIAM E. BENNETT.

Sworn to before me this 15th day of February, 1923.

[SEAL.] R. C. KLUGESCHEID,
Notary Public.

New York County No. 324. Com. expires Nov. 30, 1924.

49 *Stipulation re Exhibit "A"*

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that Exhibit "A" being a printed copy of trust agreement dated April 1, 1917, between Chile Copper Company, Guaranty Trust Company of New York, trustee, and Chile Exploration Company, need not be printed in the transcript of record, but may be handed up to the court on the argument by either of the parties.

Dated August 22, 1924.

ROOT, CLARK, BUCKNER & HOWLAND,
Attorneys for Defendant in Error.
WM. HAYWARD, *U. S. Attorney,*
Attorney for Plaintiff in Error.

So ordered.
MANTON, *U. S. C. J.*

50 *"Exhibit B" to second amended complaint*

CHILE COPPER COMPANY

STATEMENT OF ADVANCES TO CHILE EXPLORATION COMPANY

January 1, 1917, to June 30, 1918:		Amount
January	11, 1917	$250,000
June	7, "	500,000
"	21, "	500,000
July	9, "	500,000
"	24, "	500,000
"	24, "	500,000
September	27, "	1,000,000
June	30, 1918	1,000,000
Total, January 1, 1917, to June 30, 1918		4,750,000

STATEMENTS OF AMOUNTS PAID BY CHILE EXPLORATION COMPANY

January 1, 1917, to June 30, 1918:		Amount
February	2, 1917	$25,000.00 (A)
April	17, "	50,000.00 (A)
"	30, "	525,000.00 (A)
May	31, "	11,371.06 (A)
October	30, "	575,000.00 (A)
November	30, "	525,000.00 (A)
May	1, 1918	525,000.00 (B)
"	29, "	25,000.00 (B)
June	12, "	500,000.00 (B)
Total, January 1, 1917, to June 30, 1918		2,761,371.06

51 Note: Items marked (A) aggregate $1,711,371.06, applied as follows:

To interest	$541,300.70
To dividend 1916	1,170,070.36

Items marked (B) aggregating $1,050,000.00, applied as follows:

To 1918 interest on notes	$840,000.00
To 1918 interest on loans	151,909.76
To 1917 dividends	58,090.24

Note: During this period Chile Exploration Company issued to Chile Copper Company certain notes to the sum of $14,000,000. The loans account was credited with this amount and it is applied as follows:

To cash advances	$13,320,000
Bond discount	680,000

52 *"Exhibit C" to second amended complaint*

CHILE COPPER COMPANY

STATEMENT OF ASSETS AND LIABILITIES

December 31, 1916

ASSETS

Investment in Chile Exploration Company stock and properties:		
By original stock issue	$94,984,064.78	
By proceeds 7% convertible bonds	15,000,000.00	
		$109,984,064.78

Chile Exploration Company—Loan account	$11,405,733.45
Accounts receivable	5,836.57
Cash	11,119.16
	121,406,753.96

LIABILITIES

Capital stock:			
Authorized	4,400,000 shares at $25	$110,000,000.00	
Reserved for conversion of bonds	600,000 shares at $25	15,000,000.00	
	3,800,000 shares at $25		$95,000,000.00
Collateral trust 7% 10-year convertible gold bonds			15,000,000.00
Notes payable and loans			11,220,000.00
Accrued interest, taxes, etc			186,753.96
			121,406,753.96

53 *"Exhibit D" to second amended complaint*

CAPITAL STOCK TAX

RETURN FOR SPECIAL EXCISE TAX ON CORPORATIONS ORGANIZED IN THE UNITED STATES

(Sec. 407, Title IV, act of Sept. 8, 1916.)

Return of fair value of stock for the fiscal year ended June 30, 191___, by Chile Copper Company, holding company, located at 120 Broadway, New York, New York.

The address must be that of the principal place of business of the corporation.

If no figures are to be extended opposite any item in the return, the word "None" should be inserted.

Corporations, joint-stock companies or associations, or insurance companies, organized for profit in the United States.

1. Total number of shares of stock now outstanding 3,800,000.
2. Par value of shares, $25.00.
3. Par value of total capital stock now outstanding, $95,000,000.
4. Amount of surplus, none.
5. Amount of undivided profits, $2,582,050.22 deficit.
6. Average fair value per share of stock computed as follows (see par. 10 of Instructions or art. 6 of Regulations):

54 Case I.—Average market value per share of stock listed on New York Stock Exchange during preceding fiscal year, computed as follows:

Highest price quoted—

July, 1915	$19.00
Aug., 1915	19.00
Sept., 1915	19.50

Oct., 1915	$26.50
Nov., 1915	26.00
Dec., 1915	25.00
Jan., 1916	23.50
Feb., 1916	23.375
Mar., 1916	22.125
Apr., 1916	22.75
May, 1916	20.75
June, 1916	21.00
Average	$22.375

Case II.—Stock not listed on any exchange. Average market value per share computed from sales made during preceding fiscal year:

Highest sale price—

(Blank)

Case III.—Information upon which corporation may estimate, subject to approval of collector and commissioner, the fair value of stock that *that* is not listed on any exchange and of which no sales have been made during preceding fiscal year, July 1, 191__, to June 30, 191__, or if sales have been made and price is unknown:

(Blank)

Estimated fair value per share, $22.375.

55 7. Total number of shares of stock outstanding on June 30, 1916, 3,800,000,000.

8. Fair value of total capital stock for preceding fiscal year ended June 30, 1916 (No. 6, multiplied by No. 7)	$85,025,000.00
9. Deduction allowed by law	99,000.00
10. Difference, amount of fair value of stock over $99,000.00 upon which tax should be computed	$84,926,000.00

11. Tax at rate of 50 cents per year for each full $1,000.00 (see par. 13 of Instructions) one-half year, $21,231.50.

12. Amount of munitions tax, if any, paid under Title III of this act since making the last previous return, $_____ None.

13. Difference, amount of tax due, $21,231.50.

We, Harry F. Guggenheim, vice president, and C. K. Lipman, Secy. of the above-named company, whose return for special excise tax is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and

in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct in each and every particular.

(Signed) HARRY F. GUGGENHEIM,
Vice President.

(Signed) C. K. LIPMAN, *Secy.*

Sworn to and subscribed before me this 28th day of Feby., 1917.

(Signed) S. D. HOLINE,
Notary Public.
(SEAL)

56 To the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue for the Second District of New York:

SIR: The undersigned, Chile Copper Company, having under protest and duress, executed and caused to be verified the annexed "Return for special excise tax on corporations organized in the United States" upon official Form 707, as prescribed by the United States Treasury Department, protests against being required to make said return and against the assessment of any tax based thereon or otherwise, against Chile Copper Company, under the provisions of section 407, Title IV of the act of Congress approved September 8, 1916, on the ground that Chile Copper Company is engaged solely in representing the interests of a large number of persons in the business of Chile Exploration Company (all of whose stock is owned by Chile Copper Company); that Chile Copper Company exists only for the convenience of such persons in exercising their control as stockholders over said Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company; that its activities are limited to keeping up its corporate organization, voting the stock of said Chile Exploration Company, receiving dividends upon such stock and distributing the moneys thus received as dividends among its own stockholders; that in view of the facts above set forth Chile Copper Company was not "organized for profit" and is not "carrying on or doing busi-
57 ness" within the meaning of said section 407 of Title IV of the said act of Congress, and is not required by said act of Congress to pay the special excise tax imposed thereby or to render any statement or return, or to comply with any regulations of the Secretary of the Treasury, or the Commissioner of Internal Revenue, prescribed under authority of said act of Congress.

Respectfully submitted.

CHILE COPPER COMPANY,
(Signed) By HARRY F. GUGGENHEIM,
Vice President.

Attest:
(Signed) C. K. LIPMAN,
Secretary.

Address: 120 Broadway, New York City.

58 *"Exhibit E" to second amended complaint*

Form 707—Revised April, 1917

CAPITAL STOCK TAX

RETURN FOR SPECIAL EXCISE TAX ON CORPORATIONS ORGANIZED IN THE UNITED STATES

(Sec. 407, Title IV, act Sept., 1916)

RETURN OF FAIR VALUE OF STOCK FOR THE FISCAL YEAR ENDED JUNE 30, 1917

Name Chile Copper Company,
Address 120 Broadway,
New York, N. Y.

(Kind of business)

1. Holding company.
2. Par value of common stock $95,000,000.00

Outstanding June 30, 1917

4. Total par value of capital stock $95,000,000.00
5. Amount of surplus ..... None
6. Amount of undivided profits ..... None
7. Average fair value of stock per share to be computed as indicated in the cases shown below:

59 Case 1

1916	
July	$19.875
Aug	19.75
Sept	22.00
Oct	23.00
Nov	32.75
Dec	25.25
1917	
Jan	25.00
Feb	23.00
Mar	24.75
Apr	22.50
May	23.625
June	21.50
Average	$23.54

Total number of shares outstanding June 30, 1917:

8. Common stock (No. shares 3,800,000) multiplied by average value as above $89,452,000.00.

10. Fair value of total capital stock for preceding fiscal year ended June 30, 1917	$89,452,000.00
11. Deduction allowed by law	99,000.00
12. Amount of fair value of stock over $99,000.00	89,353,000.00
13. Tax at rate of 50 cents per year for each full $1,000.00	44,676.50
15. Difference, amount of tax due	44,676.50
Total tax and penalty	44,676.50

60 We, president, and , treasurer of the above-named company, whose return for special excise tax is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in any additional list or lists attached to or accompanying this return, are to his best knowledge and belief and from such information as he has been able to obtain, true and correct.

WILLIAM C. POTTER,
Vice President.
L. FREDERICK,
Treasurer.

Sworn to and subscribed before me this 31st day of Aug., 1917.
S. D. HOLINER.

To the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue, for the Second District of New York

SIRS: The undersigned, Chile Copper Company, having under protest and duress, executed and caused to be verified the annexed "Return for special excise tax on corporations organized in the United States" upon official Form No. 707, as prescribed by the United States Treasury Department, protests against being required to make said return and against the assessment of any tax based thereon or otherwise, against Chile Copper Company,
61 under the provisions of section 407, Title IV of the act of Congress approved September 8, 1916, on the ground that Chile Copper Company is engaged solely in representing the interests of a large number of persons in the business of Chile Exploration Company (all of whose stock is owned by Chile Copper Company); that Chile Copper Company exists only for the convenience of such persons in exercising their control as stockholders over said Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company; that its activities are limited to keeping up its corporate organization, voting the stock of said Chile Exploration Company, receiving dividends upon such stock and distributing the moneys thus received among its own stockholders; that in view of the facts above set forth Chile Copper Company was not "organized for profit" and is not "carry-

ing on or doing business" within the meaning of said section 407 of Title IV of the said act of Congress, and is not required by said act of Congress to pay the special excise tax imposed thereby or to render any statement or return, or to comply with any regulations of the Secretary of the Treasury, or the Commissioner of Internal Revenue, prescribed under authority of said act of Congress.

Respectfully submitted.

CHILE COPPER COMPANY,
By (signed) WILLIAM C. POTTER,
Vice president.

Attest:
(Signed) C. K. LIPMAN,
Secretary.

Address: 120 Broadway, New York City.

62 *"Exhibit F" to second amended complaint*

CHILE COPPER COMPANY

STATEMENT OF ADVANCES TO CHILE EXPLORATION COMPANY

July 1, 1918, to June 30, 1919:

			Amount
July	31,	1918	$1,000,000.00
December	31,	"	1,000,000.00
January	31,	1919	150,000.00
February	3,	"	500,000.00
"	7,	"	250,000.00
"	18,	"	250,000.00
"	28,	"	150,000.00
March	10,	"	350,000.00
"	11,	"	50,000.00
"	13,	"	150,000.00
"	20,	"	150,000.00
"	24,	"	300,000.00
"	31,	"	150,000.00
April	1,	"	100,000.00
"	4,	"	175,000.00
"	11,	"	200,000.00
"	22,	"	725,000.00
May	2,	"	100,000.00
"	6,	"	165,000.00
"	9,	"	100,000.00
"	12,	"	400,000.00
"	15,	"	46,000.00
June	1,	"	100,000.00
"	3,	"	75,000.00
"	4,	"	50,000.00
"	9,	"	250,000.00
"	14,	"	100,000.00
"	16,	"	100,000.00
Total, July 1, 1918, to June 30, 1919			7,136,000.00

63 STATEMENT OF AMOUNTS PAID BY CHILE EXPLORATION COMPANY

July 1, 1918, to June 30, 1919:	Amount	
November 30, 1918	$75,000.	(A)
December 3, "	50,000.	(A)
June 11, 1919	5,000.	(B)
Total, July 1, 1918, to June 30, 1919	130,000.	

NOTE: Items marked (A) amounting to $125,000 represent balance due on 1917 dividend.

Item marked (B), $5,000, applied to arrears of interest.

"Exhibit G" to second amended complaint

CHILE COPPER COMPANY

Statement showing monthly debit balances in call loan account for year ending June 30, 1919

July 31, 1918	None.
August 31, 1918	$5,000,000.00
September 30, 1918	5,000,000.00
October 31, 1918	5,000,000.00
November 30, 1918	5,000,000.00
December 31, 1918	5,000,000.00
January 31, 1919	5,000,000.00
February 28, 1919	4,500,000.00
March 31, 1919	2,900,000.00
April 30, 1919	1,900,000.00
May 31, 1919	450,000.00
June 30, 1919	700,000.00

64 *"Exhibit H" to second amended complaint*

CHILE COPPER COMPANY

(From records of Guaranty Trust Company of New York)

Year	Month	Loans placed		Loans called	
		Number	Amount	Number	Amount
1918	August	34	$6,120,000	8	$1,170,000
	September	2	650,000	28	5,600,000
	October	37	8,550,000	16	3,550,000
	November	16	2,550,000	15	2,850,000
	December	11	1,250,000	7	1,275,000
1919	January	8	1,525,000	9	1,525,000
	February	3	650,000	4	625,000
	March	5	700,000	18	2,425,000
	April	2	600,000	5	1,475,000
	May	6	1,200,000	12	2,650,000
	June	17	2,250,000	13	1,900,000
		141	26,045,000	135	25,045,000

65 *"Exhibit I" to second amended complaint*

CHILE COPPER COMPANY

STATEMENT OF INTEREST ON CALL LOANS

Fiscal year July 1st, 1918–June 30th, 1919:	Amount
July, 1918	
August, 1918	$1,680.93
September, 1918	41,932.23
October, 1918	12,688.36
November, 1918	21,900.09
December, 1918	17,628.41
January, 1919	28,839.37
February, 1919	19,277.81
March, 1919	23,167.68
April, 1919	16,058.23
May, 1919	8,638.77
June, 1919	2,767.32
	194,579.20

66 *"Exhibit J" to second amended complaint*

Treasury Department,
U. S. Internal Revenue.
Form 707—Revised June, 1918.
(To be stamped by collector showing district and date received.)

CAPITAL STOCK TAX

RETURN FOR SPECIAL EXCISE TAX ON CORPORATIONS ORGANIZED IN THE UNITED STATES

(Sec. 407, Title IV, act Sept. 8, 1916)

RETURN OF FAIR VALUE OF CAPITAL STOCK FOR THE FISCAL YEAR ENDED JUNE 30, 1918

Tax payable in advance for the year ending June 30, 1919. Carefully read all instructions before making return

(Do not paste riders to face of return)

1. Name, Chile Copper Company.
2. Address, 120 Broadway, New York, N. Y.
3. Nature of business in detail, Holding company.
4. Incorporated or organized in State of Delaware.
5. Date of incorporation or organization, April 16th, 1913.

67 6. Capital and surplus as of close of fiscal year ended Dec. 31, 1917. (See Special Instructions No. 2, page 4 hereof.)
Capital stock outstanding:

	Number of shares	Par value per share	Total par value
7. Common	3,800,000	$25.00	$95,000,000.00
8. First preferred			
9. Second preferred			
10. Total			95,000,000.00
11. Amount of surplus			3,185,891.38
12. Amount of undivided profits			
13. Grand total			91,814,108.62

COMPUTATION OF TAX

(Complete Exhibits A, B, and C and read all instructions before computing the tax)

14. Fair value of total capital stock for fiscal year determined by exhibit	$76,380,000.00
15. Deduction allowed by law	5,000.00
16. Amount of fair value of capital stock over $99,000	76,375,000.00
17. Tax at rate of 50 cents per year for each full $1,000	76,375.00
18. Amount of munitions tax, if any, paid under Title III of act of September 8, 1916, since making last return	
19. Difference (net amount of tax due)	
20. Penalty	
21. Total tax and penalty	

Space below not to be used by taxpayer.

(All blank)

Exhibit A to Exhibit J

(See Special Instructions No. 4, page 4)

Condensed balance sheet as of _____

Debits and assets, books of account:	
Real estate	
Buildings	
Machinery	
Cash	$535,922.14
Accounts receivable	1,544,341.34
Notes receivable	14,000,000.00
Securities	108,668,064.78
Inventory	
Deferred assets	
Other assets	
Treasury bonds	
Treasury stock	
Deferred charges	
Totals	124,748,328.26

69

Credits and liabilities, books of account:	
Bonded debt	$32,665.000.00
Mortgages	
Accounts payable	269,219.64
Notes payable	
Deferred liabilities	
Other liabilities	
Reserves	
Depreciation	
Depletion	
Subtotal	32,934,219.64
Deferred credits	
Capital stock	95,000,000.00
Common	
Preferred	
Surplus	
Profit and loss	3,185,891.38
Totals	124,748,328.26

Recapitulation of Exhibit A

Total debits and assets after deducting debit items not actual assets	$124,748,328.26
Less total of credits and liabilities after deducting capital stock, surplus, and other credits not actual liabilities	32,934,219.64
Difference (value of total capital stock reflected by Exhibit A)	91,814,108.62

70 *Exhibit B to Exhibit J*

(See Special Instructions No. 5, page 4)

Quotations or outside sales prices

Month	Number of common shares outstanding	Price
January	3,800,000	$25.24
February	3,800,000	22.43
March	3,800,000	24.60
April	3,800,000	22.91
May	3,800,000	22.08
June	3,800,000	22.08
July	3,800,000	20.56
August	3,800,000	18.99
September	3,800,000	17.37
October	3,800,000	16.45
November	3,800,000	14.25
December	3,800,000	14.30
Average	3,800,000	20.10

Recapitulation of Exhibit B

Average sale value of common stock per share, $20.10, multiplied by 3,800,000 average number of shares	$76,380,000.00
Average sale value of first preferred stock per share, $_____, multiplied by _____ average number of shares	
Average sale value of second preferred stock per share, $_____, multiplied by _____ average number of shares	
Total (value of total capital stock reflected by Exhibit B)	

71 *Exhibit C to Exhibit J*

(See Special Instructions No. 6, page 4)

Annual income

Fiscal year ended—	Net income	Adjusted income
1913	$191,683.97	$191,683.97
1914	658,761.49	658,761.49
1915	1,004,792.40	1,004,692.40
1916	1,121,347.00	1,121,347.00
1917	59,315.61	59,315.61
Average	607,180.09	607,180.09

Recapitulation of Exhibit C

Average annual income as adjusted	
Capitalized at _____ per cent (value of total capital stock reflected by Exhibit C)	

72 To the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Collector of Internal Revenue, for the Second District of New York.

SIRS: The undersigned, Chile Copper Company, having under protest and duress executed and caused to be verified the annexed "Capital Stock Tax Return" upon Form No. 707 as directed by the United States Treasury Department, protests against being required to make said return and against the assessing of any tax based thereon or otherwise against Chile Copper Company under the provisions of section 407, Title IV of the act of Congress approved September 8, 1916, said title being commonly called the capital stock tax act, on the ground that at all times both before July 1, 1917, between July 1, 1917, and June 30, 1918, and after June 30, 1918, Chile Copper Company was engaged solely in representing the interests of a large number of persons in the business of Chile Exploration Company, all of whose stock is owned by Chile Copper Company; that Chile Copper Company exists only for the convenience of such persons in exercising their control as

stockholders over said Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company; that its activities are and have been limited to keeping up its corporate organization, voting the stock of said Chile Exploration Company, holding said stock and the other securities of Chile Exploration Company, receiving dividends upon such
73 stock and distributing the moneys thus received among its own stockholders; that Chile Copper Company is not and has not been "carrying on or doing business" within the meaning of said title of said act of Congress, and is not required by said title of said act of Congress to pay any tax imposed thereby or to render any statement or return or to comply with any regulations of the Secretary of the Treasury or of the Commissioner of Internal Revenue prescribed under the authority of said act of Congress.

Respectfully submitted.

CHILE COPPER COMPANY,

By ----------,

Asst. Treasurer.

Address 120 Broadway, New York City.

74 *"Exhibit K" to second amended complaint*

CHILE COPPER COMPANY

STATEMENT OF ADVANCES TO CHILE EXPLORATION COMPANY

July 1, 1919, to June 30, 1920:	Amount
July 9, 1919	$100,000
" 11, "	150,000
" 16, "	100,000
" 29, "	100,000
August 5, "	50,000
October 1, "	200,000
Total July 1, 1919, to June 30, 1920	700,000

STATEMENT OF AMOUNTS REPAID BY CHILE EXPLORATION COMPANY

July 1, 1919, to June 30, 1920:	Amount
September 11, 1919	$500,000
" 22, "	300,000
" 24, "	300,000
" 29, "	800,000
November 1, "	500,000
April 1, 1920	1,000,000
" 8, "	1,000,000
" 16, "	500,000
May 1, "	200,000
Total, July 1, 1919, to June 30, 1920	5,100,000

Note.—Above amount applied as follows:

To cash advances	$2,588,178.45	
Interest on notes	1,680,000.00	
Interest on loans	831,821.55	5,100,000

75 *"Exhibit L" to second amended complaint*

CHILE COPPER COMPANY

STATEMENT SHOWING MONTHLY DEBIT BALANCES IN CALL LOAN ACCOUNT FOR YEAR ENDING JUNE 30, 1920

July 31, 1919	$250,000
August 31, 1919	200,000
September 30, 1919	1,000,000
October 31, 1919	1,100,000
November 30, 1919	5,100,000
December 31, 1919	5,100,000
January 31, 1920	6,100,000
February 28, 1920	6,100,000
March 31, 1920	6,100,000
April 30, 1920	9,100,000
May 31, 1920	9,100,000
June 30, 1920	9,100,000

76 *"Exhibit M" to second amended complaint*

CHILE COPPER COMPANY

(From records of Guaranty Trust Company of New York and Central Union Trust Company)

Year	Month	Loans placed		Loans called	
		Number	Amount	Number	Amount
1919	July	5	$600,000	8	$1,050,000
	August			1	50,000
	September	11	1,950,000	5	1,000,000
	October	16	2,150,000	16	2,200,000
	November	23	4,700,000	2	700,000
	December	18	2,900,000	15	3,100,000
1920	January	8	950,000	5	950,000
	February	9	1,600,000	8	1,300,000
	March	22	3,150,000	12	2,150,000
	April	42	6,150,000	20	3,350,000
	May	33	5,650,000	41	5,950,000
	June	37	7,400,000	47	7,300,000
		224	37,200,000	180	29,100,000

77 "*Exhibit N*"—*to second amended complaint*

CHILE COPPER COMPANY

STATEMENT OF INTEREST ON CALL LOANS

Fiscal year, July 1, 1919–June 30, 1920:

		Amount
July	1919	$3,537.12
August	"	1,146.70
September	"	2,370.15
October	"	2,976.77
November	"	6,743.46
December	"	47,612.02
January	1920	4,356.40
February	"	37,326.57
March	"	41,959.09
April	"	36,604.08
May	"	60,401.21
June	"	87,333.33
		332,366.90

78 "*Exhibit O*"—*to second amended complaint*

Treasury Department
U. S. Internal Revenue
Form 707—Revised June, 1919
(To be stamped by collector showing district and date received.)

CAPITAL STOCK TAX

RETURNS FOR DOMESTIC CORPORATIONS

(Sec. 1000, Title X, revenue act of 1916)

File with Collector of Internal Revenue for your district

(Do not paste riders to face of return)

1. Name, Chile Copper Company.
2. Address, 120 Broadway, New York.
3. Name of parent company.
4. Name of subsidiary or attach list, Chile Exporation Co.—Chile Steamship Co., subsidiary of Chile Exploration Company.
5. Nature of business in detail, Holding company.
6. Incorporated or organized in State of Delaware. Date of incorporation or organization, April 16, 1913.

7. Return as of close of fiscal year ended, Dec. 31, 1918. Fire insurance carried, as of date, line 7, $_____

Capital stock outstanding:

79

	Number of shares	Par value per share	Total par value
8. Common	3,800,000	$25.00	$95,000,000.00
9. First preferred			
10. Second preferred			
11. Total			95,000,000.00
12. Amount of surplus deficit			3,210,380.97
13. Amount of undivided profits			
14. Grand total			91,789,619.03

TAX PAYABLE ANNUALLY IN ADVANCE

Return for taxable period July 1, 1919, to June 30, 1920, based on fair average value of capital stock for preceding year

CAREFULLY READ ALL INSTRUCTIONS BEFORE MAKING RETURN

COMPUTATION OF TAX

DOMESTIC CORPORATIONS (EXCEPT DOMESTIC MUTUAL INSURANCE COMPANIES)

(Complete Exhibits A, B, and C, and read all instructions before computing the tax)

15. Fair value of total capital stock for fiscal year determined by Exhibit B	$65,246,000
16. Deduction allowed by law	5,000
17. Amount of fair value of capital stock over $5,000	65,241,000
18. Tax at rate of $1 per year for each full $1,000	65,241
80 19. Penalty.	
20. Total tax and penalty.	

DOMESTIC MUTUAL INSURANCE COMPANIES

21. Sum of surplus or contingent reserves maintained for general use of the business.
22. Plus any reserves the net additions to which are included in net income under the provisions of Title II, revenue act of 1918.
23. Total.
24. Deduction allowed by law.
25. Amount in excess of $5,000.
26. Tax at rate of $1 for each full $1,000 in excess of $5,000.
27. Penalty.
28. Total tax and penalty.

Exhibit A to Exhibit O

(See Special Instructions No. 4, page 4.)

Condensed balance sheet, as of Dec. 31st, 1918

Debits and assets, books of account:		
Real estate		
Machinery		
Securities		$109,668,064.78
Cash		6,282,741.17
Notes receivable		14,000,000.00
Accounts receivable		4,523,239.21
Inventory		
Other assets		
Subtotal		134,474,045.16
Good will, patents, etc		
Deferred charges		8,049.94
Totals		134,482,095.10
Credits and liabilities, books of account:		
Bounded debt $		
Less in Treas	$42,353,250.00	
Mortgages		
Accounts payable	339,226.07	
Notes payable		
Other Liabilities		
Reserves		
Depreciation		
Depletion		
Subtotal	42,692,476.07	
Deferred credits		
Capital stock		
Preferred $		
Less in Treas	95,000,000.00	
Common $		
Less in Treas		
Surplus		
Profit and loss	3,210,380.97 Loss (red ink)	
Totals	134,482,095.10	

RECAPITULATION OF EXHIBIT A

Total debits and assets after deducting debit items not actual assets	$134,474,045.16
Less total of credits and liabilities after deducting capital stock, surplus, and other credits not actual liabilities	42,692,476.07
Difference (value of total capital stock reflected by Exhibit A)	91,781,569.09

82 *Exhibit B to Exhibit O*

(See Special Instructions No. 5, page 4)

The stock of Chile Copper Company is actively and steadily traded in the New York Stock Market, total sales for the calendar year 1918 being 530,790 shares. The fair value of the company's capital stock is therefore reported at the amount reflected by Exhibit B, computed on the daily average of such stock quotations as reflecting the valuations placed upon the shares of this company in a free and open market in bona fide transactions on a large scale. This valuation, in our opinion, most nearly shows "the fair average value of the capital stock for the preceding year" fixed by the law as the value of this company's capital stock for the purpose of this tax.

QUOTATIONS OR OUTSIDE SALES PRICES

New York Stock Exchange

	Number of common shares outstanding	Price
January	3,800,000	$16.122
February		16.528
March		15.863
April		15.615
May		16.228
June		15.645
July		16.586
August		16.354
September		16.081
October		20.505
November		21.361
December		19.155
Total		206.043
Average		17.170

83 RECAPITULATION OF EXHIBIT B

	This column for use of taxpayer
Average sale value of common stock per share, $17.17, multiplied by 3,800,000 average number of shares	$65,246,000
Average sale value of first preferred stock per share, $———, multiplied by———average number of shares	
Average sale value of second preferred stock per share, $———, multiplied by———average number of shares	
Total (value of total capital stock reflected by Exhibit B)	65,246,000

EXHIBIT C TO EXHIBIT O

(See Special Instructions No. 6, page 4)

Annual income

The additions of $2,318,743.08 under Exhibit "C" for year 1918, consists of interest received from Chile Exploration Company amounting to $993,743.08, and dividend from Chile Exploration Company amounting to $1,325,000.

Fiscal year ended—	Net income (deficit in red)	Additions	Adjusted income
1914	$658,761.49 deficit		$658,761.49 deficit
1915	1,004,792.40 "		1,004,792.40 "
1916	1,121,347.00 "		1,121,347.00 "
1917	59,315.61 "		59,315.61 "
1918	2,343,232.67 "	$2,318,743.08	24,489.59 "

84 STATE OF NEW YORK,
County of New York, ss:

We, Harry F. Guggenheim, vice president, and A. Hirschthal, Asst. treasurer, of the above-named company, whose return for special excise tax is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief and from such information as he has been able to obtain, true and correct.

(Signed) HARRY F. GUGGENHEIM,
Vice president.

(Signed) A. HIRSCHTHAL,
Asst. Treasurer.

Sworn to and subscribed before me, this 31st day of July, 1919.

(Signed) N. E. THIEL,
Notary Public, etc.

85 To the Secretary of the Treasury, the Commissioner of Internal Revenue and the Collector of Internal Revenue for the Second District of New York.

SIRS: The undersigned, Chile Copper Company, having under protest and duress executed and caused to be verified the annexed "Capital Stock Tax Return" upon Form No. 707 as directed by the United States Treasury Department, protests against being required to make said return and against the assessing of any tax based thereon or otherwise against Chile Copper Company under the provisions of Title X of revenue act of 1918, being the act of Congress approved February 24, 1919, said title being commonly called the capital stock tax act, on the ground that at all times, both before July 1, 1918, between July 1, 1918, and June 30, 1919, and after June 30, 1919, Chile Copper Company was engaged solely in representing the interests of a large number of persons in the business of Chile Exploration Company, all of whose stock is owned by Chile Copper Company; that Chile Copper Company exists only for the convenience of such persons in exercising their control as stockholders over Chile Exploration Company and receiving the profits arising from the business of said Chile Exploration Company; that its activities are and have been limited to keeping up its corporate organization, voting the stock of said Chile Exploration Company, holding said stock and the other securities of Chile Explora-
86 tion Company, receiving dividends upon such stock and distributing the moneys thus received among its own stockholders; that Chile Copper Company is not and has not been "carrying on or doing business" within the meaning of said title of said act of Congress, and is not required by said title of said act of Congress to pay any tax imposed thereby or to render any statement or return or to comply with any regulations of the Secretary of the Treasury or of the Commissioner of Internal Revenue prescribed under the authority of said act of Congress.

Respectfully submitted.

CHILE COPPER COMPANY,
By (Signed) A. HIRSCHTHAL,
Asst. Treasurer.

Address: 120 Broadway, New York City.

(Filed May 14, 1923)

87 In United States District Court

Notice of motion to dismiss

(Filed June 19, 1923)

[Title omitted.]

Please take notice that the undersigned will move this court at a stated term for the hearing of motions to be held at the United States courts and post office building, in the Borough of Manhattan, city, county, State, and southern district of New York, on

the 22nd day of June, 1923, at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard for an order granting to the defendant herein judgment dismissing the second amended complaint, upon the ground that said second amended complaint does not state facts sufficient to constitute a cause of action and for such other and further relief as may be just in the premises.

Dated, New York, June 9, 1923.

Yours, etc.,

WILLIAM HAYWARD,
United States Attorney for the
Southern District of New York,
Attorney for Defendant.

Office and P. O. Address, U. S. Courts and P. O. Bldg., Borough of Manhattan, City of New York.

88 To—

ROOT, CLARK, BUCKNER & HOWLAND, Esqs.,
Attorneys for Plaintiff,
31 Nassau Street, Borough of Manhattan,
City of New York.

In United States District Court

[Title omitted.]

Opinion

Opinion (Nov. 14, 1923)

LEARNED HAND, D. J.: It is quite true that this plaintiff has been doing all that it was organized to do, and that this feature constantly runs through the cases, as if it were in some sense a test of whether it was "doing business" at all. Yet I can-
89 not think that this would be a sound rule, or that it makes any difference whether the chartered powers are fully employed or not, because as Mr. Justice Holmes said in U. S. v. Emery-Bird, Thayer Realty Co., 237 U. S. 28, the question is what it does and not what it can do. There would be no justification in treating two corporations differently who did exactly the same things merely because one had an extensive charter and the other did not.

Had this been a lease I think there could be no doubt. The different incidents of the plaintiff's activity have all been passed on. Thus receiving and distributing dividends is not enough to bring the lessor within the statute, Zonne v. Minneapolis Syndicate, 220 U. S. 187; McCoach v. Minehill Ry., 228 U. S. 296; U. S. v. Nipissing Mines Co., 206 U. S. Fed. Rep. 431 (C. C. A. 2); West End Ry. v. Malley, 246 Fed. Rep. 625 (C. C. A. 1). Nor is the result different if the lessor in addition issues bonds direct to the lessee for his use in paying for improvements upon the leased lands, Anderson v.

Morris & Essex R. R., 216 Fed. Rep. 83 (C. C. A. 2); N. Y. Central v. Gill, 219 Fed. Rep. (C. C. A. 1); Traction Cos. v. Collectors, 223 Fed. Rep. 984 (C. C. A. 6); Public Service Co. v. Herold, 229 Fed. Rep. 902 (C. C. A. 3). In one of the cases comprised within Public Service Co. v. Herold, supra, it was held that when the lessor, instead of delivering bonds to the lessee to be sold, sold the bonds himself and paid the money to the lessee the result was the same. The following cases present variants upon the general situation in each of which the lessor was held not to be "doing business"; condemning lands for the lessee, N. Y. Central v. Gill, supra; selling parts of the leased property, Traction Cos. v. Collectors, supra;
90 selling the whole property, Miller v. Snake River Valley R. R., 223 Fed. Rep. 946; providing for the issue of new bonds to refund others cancelled, Public Service Co. v. Herold, supra; maintaining a sinking fund and extending an indebtedness, McCoach v. Continental etc. Co., 233 Fed. Rep. 976; acquiring new property for the lessee and improving it to answer to the lease, Jasper etc. Co. v. Walker, 238 Fed. Rep. 533 (C. C. A. 5) (certainly an extreme case); investing the lessor's surplus funds in investments more profitable than bank deposits, McCoach v. Minehill Ry. Co., 228 U. S. 295.

Had the plaintiff leased its property to the Exploration Co., and thereafter done what it did, there can then be no doubt that it would not have been liable to the tax. It seems to me to make no difference that it was organized to do the same things. The term "business" means some profitable activity undertaken on its own account. There was such a business but it was the mining and sale of copper, to which both corporations were necessary, owing to the state of the Chilean law. Of course, it is true that each was doing a part of that business, because financing was a necessary incident to its prosecution. But the excise does not exact a double tax for leave to do a single business, and the plaintiff was in substance no more than the personification of a part of the enterprise. Except for the separation of the corporate activities no one would suggest that the Exploration Co. was doing two businesses. As things are, the nearest approach to a separate business is the plaintiff's investment of its funds in call loans. That, however, falls quite within the rule in McCoach v. Minehill Ry Co., supra.

The defendant argues that Van Baumbach v. Sargent Land
91 Co., 242 U. S. 503, changed the earlier rule and made obsolete the decisions in the lower courts which have depended upon it. I can not so understand that decision. The lessor by no means confined itself to activities incidental to the execution of the lease and it was to those added doings that it owed its liability to the tax. It is true that among these was the employment of a supervising engineer (a company), and that this is one of the activities relied upon. While this was a natural incident to the protection of the lessor's interests, yet it was no part of the execution of the

lease, no part of the business conducted by the lessee. However that may be, the lessor did much more than that. It explored the soil on its own account, sold land, made stumpage contracts, and leased lots in a village and to squatters. In short, it appears to have managed the surface for its profit. All this was altogether independent of the business of the lessee.

Chemung Iron Co. v. Lynch, 269 Fed. Rep. 368 (C. C. A. 8), was a similar case though the lessor merely hired a supervising engineer and explored the soil. In Boston Terminal Co. v. Gill, 246 Fed. Rep. 604 (C. C. A. 1), the plaintiff conducted a number of profitable ventures in its railway station, quite separate from its formal maintenance of that station, for the benefit of the five roads which built it.

I see no ground in these cases to suppose that the earlier decisions are no longer controlling, and for the reasons already given I think that the motion to dismiss must be denied. That being so, it is my understanding that the plaintiff is to take judgment for the amount demanded with interest, and it is so ordered.

November 14, 1923.

L. H., *D. J.*

92 In United States District Court

[Title omitted.]

Order denying motion to dismiss

(Filed Nov. 26, 1923)

The defendant above named having moved this court by notice of motion for an order granting to said defendant judgment dismissing the second amended complaint upon the ground that said second amended complaint does not state facts sufficient to constitute a cause of action, and said motion having come on to be heard before Honorable Learned Hand, one of the judges of this court, at his chambers, twelfth floor, Woolworth Building, borough of Manhattan, city of New York, N. Y., and after hearing Thomas J. Crawford, Esq., of counsel for the defendant, in support of said motion, and after hearing Arthur A. Ballantine, Esq., of counsel for the plaintiff, in opposition thereto, and the court after due deliberation having rendered its opinion that the said second amended complaint states facts sufficient to constitute a cause of action,

Now, upon reading said notice of motion and said second amended complaint, and upon said opinion of this court, all of which have been heretofore filed with this court, and upon motion of Root, Clark, Buckner & Howland, attorneys for the plaintiff, it is

Ordered, that said motion to dismiss said second amended complaint be, and the same is hereby denied, and it is further

Ordered, that the plaintiff may enter judgment against the defendant for the sum of two hundred thirteen thousand one hundred eighty-eight dollars and sixty-four cents ($213,188.64), with interest as follows:

On twenty-one thousand two hundred thirty-one dollars and fifty cents ($21,231.50) from the 17th day of April, 1917; on forty-four thousand six hundred seventy-six dollars and fifty cents ($44,676.50), from the 31st day of October, 1917; on seventy-nine thousand four hundred thirty dollars ($79,430), from the 27th day of April, 1920; and on sixty-seven thousand eight hundred fifty dollars and sixty-four cents ($67,850.64) from the 27th day of April, 1920, together with the costs and disbursements of this action.

LEARNED HAND, *D. J.*

94 In United States District Court

[Title omitted.]

Judgment

(Filed Dec. 1, 1923).

The defendant above named having moved this court by a notice of motion for an order granting to said defendant judgment dismissing the second amended complaint upon the ground that said second amended complaint does not state facts sufficient to constitute a cause of action, and said motion having come on to be heard before Hon. Learned Hand, one of the judges of this court, at his chambers, twelfth floor, Woolworth Building, borough of Manhattan, New York, N. Y., and after hearing Thomas J. Crawford, Esq., of counsel for the defendant in support of said motion, and after hearing Arthur A. Ballantine, Esq., of counsel, for the plaintiff in opposition thereto; and the court after due deliberation having on the 14th day of November, 1923, rendered its opinion denying said motion on the ground that said second amended complaint states facts sufficient to constitute a cause of action, and directing that final judgment should be granted in favor of
95 the plaintiff for the amount demanded in the complaint with interest, and the plaintiff having thereupon duly entered its order in the office of the clerk of the United States District Court for the Southern District of New York, on the 26th day of November, 1923, directing that said motion be in all respects denied, and that plaintiff might enter judgment against the defendant for the sum of two hundred thirteen thousand one hundred eighty-eight dollars and sixty-four cents ($213,188.64), with interest as follows:

On twenty-one thousand, two hundred thirty-one dollars and fifty cents ($21,231.50) from the 17th day of April, 1917; on forty-four thousand six hundred seventy-six dollars and fifty cents ($44,676.50), from the 31st day of October, 1917; on seventy-nine thousand, four hundred thirty dollars ($79,430), from the 27th day of April, 1920;

and on sixty-seven thousand eight hundred fifty dollars and sixty-four cents ($67,850.64) from the 27th day of April, 1920, together with the costs and disbursements of this action;

And plaintiff having accordingly on the 28th day of November, 1923, served a copy of said order with notice of entry thereof upon the attorney for the defendant;

Now, upon motion of Root, Clark, Buckner & Howland, attorneys for the plaintiff herein, it is

Adjudged that the plaintiff, Chile Copper Company, recover of the defendant William H. Edwards, collector of internal revenue, Second New York District, the sum of two hundred thirteen thou-
96 sand, one hundred eighty-eight dollars and sixty-four cents ($213,188.64), the amount claimed in the second amended complaint, together with interest, as follows: On twenty-one thousand, two hundred thirty-one dollars and fifty cents ($21,231.50) from April 17, 1917, to December 1, 1923, amounting to the sum of eight thousand four hundred thirty-five dollars and ninety-nine cents $8,435.99); on forty-four thousand six hundred seventy-six dollars and fifty cents ($44,676.50) from October 31, 1917, to December 1, 1923, amounting to the sum of sixteen thousand three hundred six dollars and ninety-three cents ($16,306.93); on seventy-nine thousand four hundred thirty dollars ($79,430) from April 27, 1920, to December 1, 1923, amounting to seventeen thousand one hundred thirty dollars and forty cents ($17,130.40); and on sixty-seven thousand eight hundred fifty dollars and sixty-four cents ($67,850.64) from April 27, 1920, to December 1, 1923, amounting to the sum of fourteen thousand six hundred thirty-three dollars and twelve cents ($14,633.12), said interest amounting in the whole to the sum of fifty-six thousand five hundred six dollars and forty-four cents ($56,506.44); and plaintiff's costs having been taxed at the sum of fifteen and 65/100 dollars ($15.65); amount in the whole to the sum of two hundred sixty-nine thousand seven hundred and ten dollars and seventy-three cents ($269,710.73), and that the plaintiff have execution therefor against the defendant.

ALEX. GILCHRIST, Jr.,
Clerk of U. S. District Court
for the Southern District of New York.

97 In United States District Court

[Title omitted.]

Certificate of probable cause

(Filed Dec. 3, 1923)

The defendant above named having moved this court by notice of motion for an order granting to said defendant judgment dismissing the second amended complaint upon the ground that said

amended complaint does not state facts sufficient to constitute a cause of action, and said motion having come on to be heard before this court, and the court having filed its opinion and decision whereby said motion was denied and judgment was directed against the defendant personally, and it appearing that the money which said defendant had received from the plaintiff herein was paid by him in the Treasury of the United States in the performance of his official duty,

Now, therefore, pursuant to section 989 of the Revised Statutes of the United States, I hereby certify that there was probable cause for the act done by the defendant collector.

Dated, New York, December 1, 1923.

LEARNED HAND, *U. S. D. J.*

98 In United States District Court

[Title omitted.]

Petition for writ or error

(Filed May 22, 1924)

To the Honorable Judges of the United States District Court for the Southern District of New York:

Now comes William H. Edwards, the defendant herein, by his attorney, William Hayward, United States attorney for the Southern District of New York and feeling himself aggrieved by the judgment entered herein on December 1, 1923, in favor of the plaintiff and against this defendant, by which said judgment it was adjudged that the plaintiff have and recover from the defendant the sum of $269,710.73 and that plaintiff have execution therefor against this defendant, in which judgment and the proceedings had in this cause prior to the entry thereof certain errors were committed to the prejudice of this defendant, all of which more fully appears in the assignment of errors filed herewith.

Wherefore, defendant prays that a writ of error may be
99 allowed to him from the United States Circuit Court of Appeals for the Second Circuit to the District Court of the United States for the Southern District of New York for the correction of errors so complained of and that transcript of the record proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

Dated, New York, May 22, 1924.

WILLIAM HAYWARD,
United States Attorney for the Southern District of New York, Attorney for Defendant.

Office and post-office address: U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

100 In United States District Court

[Title omitted.]

Assignment of errors

Filed May 22, 1924

Now comes the above-named defendant by his attorney, William Hayward, United States attorney for the Southern District of New York, and files the following assignment of errors and says that the judgment entered in this cause dated December 1, 1923, is erroneous and unjust for the following reasons:

I. The court erred in denying defendant's motion to dismiss the second amended complaint herein on the ground that the said second amended complaint did not state facts sufficient to constitute a cause or causes of action.

II. The court erred in holding and deciding that the second amended complaint herein did state facts sufficient to constitute a cause or causes of action.

III. The court erred in denying defendant's motion to dismiss the alleged first cause of action set forth in the said second
101 amended complaint on the ground that the said alleged first cause of action did not state facts sufficient to constitute a cause of action.

IV. The court erred in holding and deciding that the said alleged first cause of action did state facts sufficient to constitute a cause of action.

V. The court erred in denying defendant's motion to dismiss the alleged second cause of action set forth in the said second amended complaint on the ground that the said alleged second cause of action did not state facts sufficient to constitute a cause of action.

VI. The court erred in holding and deciding that the said alleged second cause of action did state facts sufficient to constitute a cause of action.

VII. The court erred in denying defendant's motion to dismiss the alleged third cause of action set forth in the said second amended complaint herein on the ground that the said alleged third cause of action did not state facts sufficient to constitute a cause of action.

VIII. The court erred in holding and deciding that the said alleged third cause of action did state facts sufficient to constitute a cause of action.

IX. The court erred in denying defendant's motion to dismiss the alleged fourth cause of action set forth in the said second amended complaint on the ground that the said alleged fourth cause of action did not state facts sufficient to constitute a cause of action.

102 X. The court erred in holding and deciding that the said alleged fourth cause of action did state facts sufficient to constitute a cause of action.

Wherefore, defendant prays that the judgment of the District Court of the United States for the Southern District of New York, be reversed and that the said District Court be directed to enter judgment dismissing the second amended complaint herein on the merits.

WILLIAM HAYWARD,
United States Attorney.

103 [Citation in usual form filed May 24, 1924, omitted in printing.]

104 In United States District Court

[Title omitted.]

Stipulation extending time

It is stipulated and agreed by and between the attorneys for the respective parties herein that the time for the appellant to file transcript of record on appeal be and the same is hereby extended to and including August 29, 1924.

Dated, New York, August 14, 1924.

ROOT, CLARK, BUCKNER & HOWLAND,
Attorneys for Appellee.

WM. HAYWARD,
U. S. Attorney, Attorney for Appellant.

So ordered August 22, 1924.

ALEX. GILCHRIST, JR.,
Clerk.

105 In United States District Court

[Title omitted.]

Stipulation re transcript of record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, August 28, 1924.

ROOT, CLARK, BUCKNER & HOWLAND,
Attorneys for Plaintiff.

WM. HAYWARD,
U. S. Attorney, Attorney for Defendant.

106 [Clerk's certificate to foregoing paper omitted in printing.]

107 In United States Circuit Court of Appeals for the Second Circuit

WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, SECOND NEW YORK DISTRICT, plaintiff in error (defendant below)
against
CHILE COPPER COMPANY, defendant in error (plaintiff below)

Opinion

Per curiam: Judgment affirmed on the opinion of Judge Learned Hand in the court below.

108 In United States Circuit Court of Appeals

[Title omitted.]

Judgment

(Filed Feb. 24, 1925)

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issued to the said District Court in accordance with this decree.

H. W. R.
M. T. M.

109 [File endorsement omitted.]

110 [Clerk's certificate to foregoing papers omitted in printing.]

111 In Supreme Court of the United States

Order allowing certiorari

(Filed May 25, 1925)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

O

In the Supreme Court of the United States

OCTOBER TERM, 1924

WILLIAM H. EDWARDS, COLLECTOR OF Internal Revenue, Second New York District, petitioner
v.
CHILE COPPER COMPANY
No. ———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of William H. Edwards, Collector of Internal Revenue for the Second New York District, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, rendered on February 16, 1925, affirming the judgment of the District Court for the Southern District of New York.

STATEMENT OF THE CASE

This action was brought by the Chile Copper Company against the Collector to recover $213,188.64, with interest, the amount of capital-stock taxes alleged to have been erroneously collected by petitioner from the respondent for the years 1917

41995—25

to 1920, inclusive. The Collector moved for judgment dismissing the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The District Court, Judge Learned Hand presiding, denied the motion and granted judgment for the plaintiff for the full amount. (Rec. p. 88, 294 Fed. 581.)

Upon writ of error the Circuit Court of Appeals affirmed the judgment in a memorandum opinion, stating merely that the judgment of the lower court was affirmed.

THE QUESTION INVOLVED

The question involved is whether the Chile Copper Company was, during the years in question, "doing business" within the meaning of the provisions of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918. The courts below held that it was not.

THE STATUTES

Section 407 of the Revenue Act of 1916, Act of September 8, 1916, Ch. 463, 39 Stats. 756, 789, so far as is relevant, provides as follows:

> SEC. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:
>
> Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and

every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * *And provided further,* That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, * * *.

Section 1000 of the Revenue Act of 1918, Act of February 24, 1919, Ch. 18, 40 Stats. 1057, 1126, so far as relevant, provides as follows:

SEC. 1000. (a) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(c) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States, during the preceding year ending June 30, * * *.

THE FACTS

The Chile Copper Company is a corporation of the State of Delaware with capital stock outstanding of the par value of $95,000,000. (Rec. p. 4.)

The Chile Exploration Company is a corporation of the State of New Jersey, with capital stock outstanding of the par value of $1,000,000, and its principal business has been the mining of copper from property in the Republic of Chile owned by it. Since its incorporation the Chile Exploration Company could not at any time have developed its mining property without borrowing large sums of money, and in order to borrow the necessary money it would have been necessary to sell bonds or other obligations secured by mortgage upon its property, but the laws of Chile provided that mining property in that country could not be sold for debt so as to vest title thereto in creditors. Therefore the Chile Exploration Company would have been unable effectively to mortgage its mining property so as to secure an issue of its obligations, and unsecured obligations would not have been salable in investment markets. (Rec. p. 5.)

To meet this difficulty the Chile Copper Company was organized for the principal purpose of providing a means whereby money could be borrowed from investors in sums sufficiently large to develop property of the Chile Exploration Company. The Chile Copper Company accordingly was organized on April 16, 1913, to hold the capital stock of the Chile Exploration Company and pledge such stock as security for the bond issues, the proceeds of which should be used, loaned, and advanced from time to time to furnish the necessary capital to develop the mining property of the Chile Exploration Company. (Rec. p. 6.)

At all times mentioned in the complaint the Chile Copper Company owned all the stock of the Chile Exploration Company, and on April 1, 1917, it pledged that stock to the Guaranty Trust Company under an agreement between the Trust Company, the Chile Copper Company, and the Chile Exploration Company as security for an issue of bonds. (Rec. p. 6.)

The Trust Agreement provided, among other things, that the proceeds of the bonds should be used only to pay off certain existing indebtedness and for the acquisition, construction, or improvement of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from property owned by the Chile Exploration Company. (Rec. pp. 6 and 7.)

In addition, a certain other issue of bonds made in the year 1913 was still outstanding in the year 1917. (Rec. p. 7.)

The plaintiff alleges (Par. VII, Rec. p. 7 *et seq.*) that during the period from January 1 to June 30, 1917, the activities of the Chile Copper Company "without any omissions or exceptions, consisted solely of the following." These activities are then set forth at length and may be summarized as follows:

(1) Stockholders' and directors' meetings were held, directors and officers were chosen, corporate books and accounting records were kept, and an office was maintained and whatever was necessary to maintain the corporate existence and organization was done.

(2) The Chile Copper Company owned and voted the entire capital stock of the Chile Exploration Company, and thus selected directors of that company, but it did not act as purchasing or selling agent for that company.

(3) It paid the interest on $15,000,000 worth of bonds secured by a pledge of the entire capital stock of the Chile Exploration Company, the proceeds of which had been paid to that company as an additional investment in that company. It authorized a further issue of bonds of the par value of $100,000,000, to be secured by a pledge of the entire capital stock of the Chile Exploration Company, and executed an appropriate trust agreement. It executed an agreement with under-

writers and issued bonds of the par value of $35,000,000. It received payment upon said bonds from subscribers, which was deposited in a special account with the Guaranty Trust Company, and it paid the expenses of the bond issue and made provision for the accrued interest payable upon the bonds. (Rec. p. 8.)

No part of the proceeds of the bond issue was used to pay the floating indebtedness of the Chile Exploration Company or for the acquisition of property by the Chile Copper Company, but the entire proceeds were used to pay the floating debt of the Chile Copper Company or were advanced or held for future advance to the Chile Exploration Company. (Rec. pp. 9 and 10.)

(4) It received from the Chile Exploration Company payments of interest upon loans previously made, and also payments on account of a dividend, and interest-bearing notes in payment of previous loans and of a portion of the bond discount incurred in marketing the 1917 bond issue. (Rec. p. 10.)

(5) It made loans on open account to the Chile Exploration Company. (Rec. p. 10.) It furnished to the Guaranty Trust Company statements showing the application of the proceeds of checks drawn against the proceeds of the bond issue. (Rec. p. 11.)

The activities of the Chile Copper Company during the succeeding years are set forth under the different causes of action for each year and did not

differ materially from those heretofore summarized. The amount advanced by the Chile Copper Company to the Chile Exploration Company for the year ending June 30, 1917, was $1,250,000. (Rec. p. 11.) For the next year it was $3,500,000. (Rec. p. 20.) For the next year it was $7,136,000. (Rec. p. 29.) For the next year it was $700,000. (Rec. p. 41.)

In addition it invested some of its surplus funds received from the bond issue in Liberty Bonds (Rec. p. 41) and also loaned a large amount of said surplus on call loans through the Guaranty Trust Company and the Central Union Trust Company. During the year ending June 30, 1920, 224 loans aggregating $37,200,000, were made, and 180 loans aggregating $29,100,000 were called or paid. During the year ending June 30, 1920, the plaintiff received $332,366.90 interest on said loans. (Rec. p. 42.) During the year ending June 30, 1919, a portion of its surplus funds was invested in Liberty Bonds and United States Certificates of Indebtedness, and 141 call loans aggregating $26,045,000 were made, upon which it received interest amounting to $194,579.20. (Rec. pp. 30, 31.)

The Chile Copper Company claims that these activities did not constitute doing business, and the courts below have so held. The Government claims that such holding was erroneous.

REASONS FOR GRANTING THE WRIT

I

The Circuit Court of Appeals erred in holding with the District Court that the Chile Copper Company was not doing business within the meaning of the statutes involved.

The question of what constitutes doing business has been before this Court several times in cases arising under the Corporation Excise Tax of 1909, Act of August 5, 1909, Ch. 6, 36 Stats. 11, 112. *Flint* v. *Stone-Tracy Company*, 220 U. S. 107; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *McCoach* v. *Minehill & Schuylkill Haven Railroad Company*, 228 U. S. 295; *United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28; *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503.

In the *Von Baumbach case* this Court reviews its decisions in the preceding cases.

Of the *Zonne case*, Mr. Justice Day, writing for the Court, said that the Court decided that the corporation concerned "was not engaged in doing business within the meaning of the act, by reason of the fact that the corporation had practically gone out of business and had disqualified itself from any activity in respect thereto." (242 U. S. 515.)

Of the *McCoach case* Mr. Justice Day said "that a corporation which had leased all its property to another, and was doing only what was necessary to

receive and distribute the income therefrom among stockholders, was not doing business within the meaning of the Act." (242 U. S. 515–516.)

Of the *Emery, Byrd, Thayer Realty Company case,* he said:

> * * * this court held that a corporation which merely kept up its organization, distributing rent received from a single lessee, was not doing business within the meaning of the act. (242 U. S. 516.)

And in the *Von Baumbach case* the rule to be observed was stated as follows (242 U. S. 516):

> The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.

Applying this rule, it is perfectly evident that the Chile Copper Company was doing business, was maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as were essential to those purposes. The purpose of its organization was to do those things which were essential to the continued operations of the Chile Exploration Company, because the latter company would otherwise

be unable to operate effectively. Its object was to secure capital by borrowing money upon its bonds and to that end conduct the negotiations, procure appropriate agreements, and do the other things necessary to make the bonds salable; and thereafter to see that the proceeds of the bonds were applied in accordance with the agreement made between itself, the Chile Exploration Company and the Trustee. In a sense it might be said that it became the financial agent for the Exploration Company, yet that would hardly be accurate, for, considering the practical realities of the situation, the Exploration Company should rather be regarded as the agent of the Chile Copper Company. The control was in the Chile Copper Company through its ownership of all the stock of the Exploration Company. It procured the capital, it pledged its credit, and mortgaged its property for that purpose. It obligated itself to see that money thus raised was used in accordance with the agreement made with those who bought the bonds. It was the active not the passive party. While in strict contemplation of law the Exploration Company could hardly be said to be the agent of the Copper Company, nevertheless the latter company directed its operations and received the profit therefrom.

It furnished the money and put that money to work through the Exploration Company.

In addition to all this, it was actively engaged in another special line of business, the business of loaning money on call, and it also was investing its

surplus funds in United States securities. Can it be said that a company which borrowed huge sums of money to pay its own floating indebtedness and to furnish the working capital for another company whose entire stock it owned; which was loaning millions of dollars in the money market and which received by way of interest from such loans in one year over $300,000, had " practically gone out of business " and " disqualified itself from any activity in respect thereto " (the *Zonne case*), or " was doing only what was necessary to receive and distribute the income therefor among stockholders " (the *McCoach case*), or was " merely keeping up its organization, distributing rent received from a single lessee " (the *Emery Bird, Thayer Realty Company case*)? Was it not rather one which is " still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes " (the *Von Baumbach case*)? We contend, therefore, that the decision of the courts below was directly contrary to the controlling decision of this Court in *Von Baumbach* v. *Sargent Land Company* (242 U. S. 503).

Judge Hand, in his opinion in the District Court (Rec. p. 88), refers to a number of cases which have been decided in the lower Federal courts which we deem it unnecessary to consider in detail. There are numerous other cases in the District Courts which seem to indicate a reluctance on the part of those courts to accept what the Government

thinks is the meaning of the decision of this Court in the *Von Baumbach case.* So far as we know there is no case yet decided which involves facts in any way closely analogous to those in the present case.

II

The amount involved in this case, including interest and costs, is $269,710.73, and many other cases are pending involving very large sums of money, the decision of which will depend upon the decision of this case, which makes it one of great public interest and of great importance to the Treasury of the United States in the administration of its revenue laws.

The principle involved is one concerning which there has been much diversity of opinion in the lower courts, and no settled rule seems yet to have been established which has been accepted by the lower courts.

For these reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
APRIL, 1925.

○

INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 375

WILLIAM H. EDWARDS, COLLECTOR OF INTERNAL REVENUE, SECOND NEW YORK DISTRICT, PETITIONER

v.

CHILE COPPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 47) is reported in 294 Fed. 581.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 55) is reported in 5 F. (2d) 1014.

GROUNDS OF JURISDICTION

This action was brought by the Chile Copper Company to recover $213,188.64, with interest, the amount of capital stock taxes alleged to have been erroneously collected for the years 1917 to 1920,

inclusive. A motion to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action was denied by the District Court, which granted judgment for respondent for the full amount. (R. 50.)

Upon writ of error (R. 1) the Circuit Court of Appeals affirmed the judgement in a memorandum opinion stating merely that the judgment of the court below was affirmed (R. 55). From the judgment of the Circuit Court of Appeals, entered on February 24, 1925 (R. 55), the case was brought to this Court by petition for a writ of certiorari filed April 21, 1925, which petition was granted May 25, 1925 (268 U. S. 685).

QUESTION PRESENTED

Was the Chile Copper Company during the years 1917 to 1920, inclusive, "carrying on or doing business" within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918, which impose on corporations a special excise tax with respect to doing business, based on the amount of their capital stock?

The courts below held that it was not. The Government claims that this holding is erroneous.

THE FACTS

The Chile Copper Company is a corporation of the State of Delaware, with capital stock outstanding of the par value of $95,000,000. (R. 2.)

The Chile Exploration Company is a corporation of the State of New Jersey, with capital stock outstanding of the par value of $1,000,000. Its principal business has been the mining of copper from property owned by it in the Republic of Chile. Since its incorporation the Chile Exploration Company could not at any time have developed its mining property without borrowing large sums of money. In order to borrow the necessary money it would have been necessary to sell bonds or other obligations secured by mortgage upon its property. The laws of Chile, however, provided that mining property in that country could not be sold for debt so as to vest title thereto in creditors. Thus the Chile Exploration Company would be prevented from effectively mortgaging its mining property so as to secure an issue of its obligations, and unsecured obligations would not have been salable in investment markets. (R. 2–3.)

To meet this difficulty the Chile Copper Company, the respondent, was organized for the main purpose of providing a means whereby money could be borrowed from investors in sums sufficiently large to develop property of the Chile Exploration Company. Respondent accordingly was organized on April 16, 1913, to hold the capital stock of the Chile Exploration Company and pledge such stock as security for bond issues, the proceeds of which should be used, loaned, and advanced from time to time to furnish the necessary

capital to develop the mining property of the Chile Exploration Company. (R. 3.)

At all times mentioned in the complaint respondent owned all the stock of the Chile Exploration Company (R. 3), and on April 1, 1917, it pledged that stock to the Guaranty Trust Company under an agreement between itself, the Trust Company and the Chile Exploration Company as security for an issue of bonds (R. 4).

The trust agreement provided, among other things, that the proceeds of the bonds should be used only to pay off certain existing indebtedness and for the acquisition, construction, or improvement of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from the property owned by the Chile Exploration Company. (R. 3.)

In addition, a certain other issue of bonds made in the year 1913 was still outstanding in the year 1917. (R. 3.)

The respondent alleges (R. 3, par. VII *et seq.*) that during the period from January 1 to June 30, 1917, its activities "without any omissions or exceptions, consisted solely of the following." These activities are then set forth at length and may be summarized as follows:

(1) Stockholders' and directors' meetings were held, directors and officers were chosen, corporate books and accounting records were kept, and an office was maintained and whatever was necessary to

maintain the corporate existence and organization was done. (R. 3.)

(2) Respondent owned and voted the entire capital stock of the Chile Exploration Company, and thus selected directors of that company, but it did not act as purchasing or selling agent for that company. (R. 4.)

(3) It paid the interest on $15,000,000 worth of bonds secured by a pledge of the entire capital stock of the Chile Exploration Company, the proceeds of which had been paid to that company as an additional investment in that company. It authorized a further issue of bonds of the par value of $100,000,000 to be secured by a pledge of the entire stock of the Chile Exploration Company, and executed an appropriate trust agreement. It executed an agreement with underwriters and issued bonds of the par value of $35,000,000. It received payment upon said bonds from subscribers, which was deposited in a special account with the Guaranty Trust Company, and it paid the expenses of the bond issue and made provision for the accrued interest payable upon the bonds. (R. 4.)

No part of the proceeds of the bond issue was used to pay the floating indebtedness of the Chile Exploration Company or for the acquisition of property by respondent; but the entire proceeds were used to pay the floating debt of respondent or were advanced or held for future advance to the Chile Exploration Company. (R. 5.)

(4) Respondent received from the Chile Exploration Company payments of interest upon loans previously made, and also payments on account of a dividend, and interest-bearing notes in payment of previous loans and of a portion of the bond discount incurred in marketing the 1917 bond issue. (R. 5.)

(5) It made loans on open account to the Chile Exploration Company. (R. 5.)

(6) It furnished to the Guaranty Trust Company statements showing the application of the proceeds of checks drawn against the proceeds of the bond issue. (R. 6.)

The activities of respondent for the succeeding years 1918, 1919, and 1920 are set forth under the different causes of action for each year, and they do not differ materially from those just summarized.

The amount advanced by respondent to the Chile Exploration Company for the year ending June 30, 1917, was $1,250,000. (R. 6.) For the year 1918 it was $3,500,000. (R.11.) For 1919 it was $7,136,000. (R. 15.) For 1920 it was $700,000. (R. 22.)

In addition, respondent invested some of its surplus funds received from the bond issue in Liberty Bonds. (R. 22.) It also loaned a large amount of said surplus on call loans through the Guaranty Trust Company and the Central Union Trust Company. During the year ending June 30, 1920, 224 loans, aggregating $37,200,000, were made, and 180

loans, aggregating $29,100,000 were called or paid. During the year ending June 30, 1920, respondent received $332,366.90 interest on said loans. (R. 23.) During the year ending June 30, 1919, a portion of its surplus funds was invested in Liberty Bonds and United States Certificates of Indebtedness, and 141 call loans aggregating $26,045,000 were made, upon which it received interest amounting to $194,579.20. (R. 16.)

The Government claims that these activities constituted doing business within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918, and that the courts below erred in holding otherwise.

STATUTES INVOLVED

Section 407 of the Revenue Act of 1916 (39 Stat. 756, 789, ch. 463), so far as relevant, provides as follows:

> That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:
>
> Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-

stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * *And provided further,* That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year * * *.

Section 1000 of the Revenue Act of 1918 (40 Stat. 1057, 1126, ch. 18), so far as relevant, provides as follows:

(*a*) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—

(1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30 as is in excess of $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included;

* * * * *

(*c*) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corporation not engaged in business in the United States) during the preceding year ending June 30 * * *.

SPECIFICATION OF ERROR TO BE URGED

The court erred in holding that the above-enumerated activities of the Chile Copper Company for the years 1917 to 1920, inclusive, did not constitute " carrying on or doing business " within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918, *supra*.

ARGUMENT

SUMMARY

The Chile Copper Company was doing business during the years 1917 to 1920, inclusive, within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918.

(*a*) The rule announced by the decisions of this Court.

(*b*) Application of the rule announced by this Court to the facts in the case at bar.

(*c*) The decisions of United States Circuit Courts of Appeals and District Courts.

THE CHILE COPPER COMPANY WAS DOING BUSINESS DURING THE YEARS 1917 TO 1920, INCLUSIVE, WITHIN THE MEANING OF SECTION 407 OF THE REVENUE ACT OF 1916 AND SECTION 1000 OF THE REVENUE ACT OF 1918

The error of the courts below chiefly consists in failing to apply to the particular facts in the case at bar a correct interpretation of the rulings of this Court on what constitutes doing business within the purview of the taxing statutes.

To understand the decisions, it should be borne in mind that the tax under consideration is an excise upon the particular privilege of doing business in a corporate capacity, *i. e.,* with the advantages which arise from corporate organization. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107.

While the tax does not fall on the possession of the privilege unless it is exercised—and that is why the statute provides that *some* business must be done in order that the privilege be subject to the tax—nevertheless the extent to which the privileges incident to corporate organization may be exercised is not important, so long as there is some substantial use of them.

The question of what constitutes doing business has been before this Court several times in cases arising under the Corporation Excise Tax Act of 1909 (36 Stat. 11, 112, ch. 6). That Act imposed " a special excise tax with respect to the carrying on or doing business " by a corportion. It taxed only corporations " organized for profit " and measured the tax by the net income received from certain sources. The capital stock taxes imposed by the Revenue Acts of 1916 and 1918, although measured by a different standard and in the 1918 Act not limited to corporations organized for profit, nevertheless are levied upon the same business activities as were taxed by the Corporation Excise Tax Act of 1909. The decisions of this Court, therefore, on what constitutes doing business under the 1909 Act

are equally applicable to cases arising under the capital stock provisions of the Revenue Acts of 1916 and 1918 here under consideration.

(*a*) THE RULE ANNOUNCED BY THE DECISIONS OF THIS COURT

The first ruling by this Court on the scope of the term " doing business " as used in the 1909 Act was made in the *Corporation Tax Cases.* Three of those cases decided *sub nomine Flint* v. *Stone Tracy Company,* 220 U. S. 107, were the *Park Realty Company,* the *Broadway Realty Company,* and the *Clark Iron Company cases.* Each of these companies was held to be doing business. The Park Realty Company was organized with wide powers to deal in real estate by buying, selling or leasing lands and buildings and by erecting, conducting, managing or leasing hotels, etc. At the time of the imposition of the tax, however, the company had leased the single hotel owned by it, for a period of 21 years, at an annual rental of $55,000, and was engaged in no business other than the management and leasing of that hotel and was in receipt of no income other than the rental therefrom. The Broadway Realty Company was formed for the purpose of owning, holding and managing real estate. It owned an office building and some securities. The office building was let to tenants to whom light, heat and janitor service were furnished. As shown by the bill of complaint in the case, the Clark Iron Company was formed to own

and hold real estate. Its sole property was certain land upon which it had discovered iron ore. At the time of the imposition of the tax the Clark Iron Company had leased its ore lands to other parties or corporations and was engaged in no other business than the receiving of royalties from the leased property and such activities as were necessary to defend its title to such property. In holding that these companies were doing business this Court said (p. 171):

> "Business" is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People* v. *Commissioners of Taxes*, 23 N. Y. 242, 244. "That which occupies the time, attention and labor of men for the purpose of a livelihood or profit." Bouvier's Law Dictionary, Vol. I, p. 273.
>
> We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, *making investments of profits*, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases *investing the surplus*, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law. (Italics ours.)

It is important to bear in mind that the paragraph last quoted is a cumulative description of the activities of all the realty companies under

consideration and therefore is not to be taken to mean that any one company must indulge in all or several of the enumerated activities in order to be doing business. The doing of *any one* of the things enumerated was apparently considered sufficient to bring the corporation within the terms of the statute. Furthermore, it is important to note that in the Stone Tracy Company decision this Court not only expressly recognized *making investments* as doing business, but also clearly held the general view that corporations organized for the purpose of doing business and engaged in the activities for which organized, were doing business.

On the same day this Court decided the case of *Flint* v. *Stone Tracy Company, supra,* it also decided the case of *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, holding that the Minneapolis Syndicate was not doing business. This ruling, superficially viewed, is often cited as at variance with the general proposition that an active corporation engaged in the activities for which organized must be regarded as doing business. It will be well, therefore, carefully to scan the case.

At the outset this Court remarked that the *Minneapolis Syndicate case* "presents a peculiarity of corporate organization and purpose not involved in the case just decided" (*Flint* v. *Stone Tracy Company*). It appeared that the Minneapolis Syndicate was *originally organized to engage in the business of letting stores and offices in a building owned by it* and was engaged in that business up

to December 27, 1906. On that date it leased all of its property for a term of 130 years and at the same time caused its articles of incorporation to be amended so as to limit its activities to the mere holding of title to a single piece of property subject to the lease and "for the convenience of its stockholders" to receive and distribute rentals that might accrue under the lease and the proceeds of any disposition of the land. This Court, after stating that the Minneapolis Syndicate "*as originally organized* and owning and renting an office building, *was doing business,*" went on to say, however (p. 190), that—

> * * * the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. *It had wholly parted with control and management of the property;* its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. *The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it.* (Italics ours.)

Thus the principle upon which the Minneapolis Syndicate was held not to be doing business was that it had retired from the business for which it was organized and was engaged merely in the

ownership of the property and the distribution of the avails of its lease.

The next case decided was that of *McCoach* v. *Minehill Railroad Company,* 228 U. S. 295. There the Minehill Company, which was organized to engage in the railroad business and which had been engaging in that business, leased its properties to another corporation for a term of 999 years, and since such lease had not carried on any business in connection with the operation of the properties. The Minehill Company merely maintained its corporate existence, elected officers, received rentals from the leased premises, received interest from bank balances, maintained a " contingent fund " in the form of investments (*the amount and particulars of which were not specified*), received interest and dividends from such invested funds and distributed the same among its stockholders. During the term of the lease the company was also to exercise its corporate powers when requested by the lessee in order to enable the latter to enjoy all its rights and privileges with respect to the property demised. This Court concluded from these facts (p. 303)—

> that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, *which was the prime object of its incorporation.* This business, by the lease of 1896, it had turned over to the Reading Company. (Italics ours.)

This was apparently the principal ground of the decision—that the company was not doing the business for which it was organized, but had gone out of business with respect thereto. The Court expressly refused to pass upon the question as to whether the company would have been doing business had it exercised the power of eminent domain, or put in force any other special corporate power in aid of the business of the lessee. The Court said (p. 305):

> It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. *We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question.* (Italics ours.)

It is not believed that the case of *McCoach* v. *Minehill Railroad Company, supra,* militates against the conclusion that the Chile Copper Company was here doing business. While the Court there held that the receipt of interest from bank deposits and investments, the particulars of which were not disclosed, did not constitute doing business by the Minehill Company, it is clear that the reason therefor was that those activities under the particular circumstances of the case were regarded as merely incidental and not a part of the main

business of the company—a purely passive preservation of its property or funds. The Court did not hold that the *making of investments* does not constitute doing business. It does not appear that any contention was made that the Minehill Company was *making investments* during the years in suit. It is simply said that the company *received from investments which it maintained* an annual income distributed by it. There is quite a distinction between *maintaining* investments (which, so far as the record discloses, may already have been made) and the *making* of investments—that is, new investments—which is the case here.

Following the *Minehill case,* this Court next decided the case of *United States* v. *Emery, Bird, Thayer Realty Company,* 237 U. S. 28. In that case the stockholders of a drygoods company organized a real estate company, which took over the lands of the drygoods company and leased them back to the drygoods company, *the latter having the management of the property and assuming the responsibilities in respect to it.* Although the company did what it was organized to do, its functions were purely passive, and it was held not to be doing business. However, the decision of the Court was expressly founded on the proposition that the reality company acted merely as an *intermediary*—a mere conduit pipe—in the business of the drygoods company, the stockholders of both companies

being substantially the same. At the close of its opinion the Court said (p. 32):

> *The claimants' characteristic charter function and the only one that it was carrying on was the bare receipt and distribution to its stockholders of rent from a specified parcel of land. Unless its bare existence as an intermediary was doing business, it is hard to imagine how it could be less engaged.* (Italics ours.)

This decision simply follows the principle previously laid down that the mere ownership of property subject to a lease, the receipt of rentals therefrom without participation in the use or operation of the property, and the distribution of such rentals to stockholders, do not constitute doing business. As in the *Minehill case, supra,* there is nothing in this decision to justify holding here that the activities of the Chile Copper Company in selling its bonds, loaning money on call, making investments, furnishing working capital to another corporation whose capital stock it owned, seeing that the proceeds from the sale of its bonds were appropriately applied in accordance with certain agreements, and the doing of the other things necessary to the performance of those functions, do not constitute doing business. This Court has certainly never carried the doctrine of exemption that far.

The last decision rendered by this Court on what constitutes doing business was in the case of *Von Baumbach* v. *Sargent Land Company,* 242 U. S.

503. The mining corporations whose activities were under consideration in that case had leased most of their properties, but were still engaged in such activities as employing another company to see that the lessees lived up to the engagements in their contracts, making explorations and digging test pits on the leased premises, selling stumpage on burnt-over timber lands, and leasing and selling lots. All such corporations were held to be doing business. After reviewing all its former decisions (which we have just discussed), the following test for the determination as to whether or not a corporation was doing business was laid down by this Court (p. 516):

> The fair test to be derived from a consideration of all of them is between a corporation which has *reduced its activities* to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and *is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes.*
>
> From the facts clearly established in these cases, we think these corporations were doing business, within the meaning of the act. They were organized for the purposes stated, *and their activities included something more than the mere holding of property and the distribution of the receipts thereof.* (Italics ours.)

In passing, it may be noted that while there was a dissenting opinion in the *Minehill case, supra,* the decision in the *Von Baumbach case* was rendered by a unanimous court, and was intended to mark out the limit of the doctrine of exemption announced in its prior decisions, and serve to guide the courts in future cases involving the question of doing business.

(B) APPLICATION OF THE RULE ANNOUNCED BY THIS COURT TO THE FACTS IN THE CASE AT BAR

Applying the rules of the above cases, it is evident that the Chile Copper Company was doing business—was "maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes" (*Von Baumbach case*). The purpose of its organization was to do all those things essential to the continued operation of the Chile Exploration Company, because the latter company would otherwise have been unable to operate effectively. It has been carrying out that purpose to the fullest extent. It secured capital by borrowing money upon its bonds and conducted negotiations to that end; procured appropriate agreements and did all else necessary to make the bonds salable. Thereafter it saw that the proceeds of the bonds were applied in accordance with the agreement made between itself, the Chile Exploration Company and the trustee. Under the terms of

the agreement it was not only the manager of the funds raised by the sale of the bonds and supervisor of the spending of the money and its distribution to the Chile Exploration Company, but it also pledged its property to carry out the object of its incorporation.

In a sense it might be said that the Chile Copper Company became financial agent for the Exploration Company. Yet that would hardly be accurate, for, considering the practical realities of the relationship, the Exploration Company should rather be regarded as the agent of the Chile Copper Company. The entire control of the operations of the Exploration Company was in the Chile Copper Company through its ownership of all the stock of the Exploration Company. It thus selected the directors and officers of that company. It procured and advanced the working capital and to that end pledged its credit and mortgaged its property. It obligated itself to see that the money thus raised was used in accordance with the agreement made with those who bought the bonds. Thus all throughout the Chile Copper Company was the active, not the passive, party. While it is true that in strict contemplation of law the Exploration Company could hardly be said to be the agent of the Copper Company, nevertheless the latter company was the *sine qua non* to the effective operation of the former, the arbiter of the necessities of its business and the recipient of the profit therefrom.

In brief, it furnished the money and directed the work of that money through the Exploration Company. Can all that this entails be said not to constitute the doing of business?

Yet it did even more. In addition to the above activities, the Chile Copper Company was actively engaged in another special line of business—the business of loaning money on call to outsiders and the making of investments with its surplus funds in United States securities.

Can it be said that a company which borrowed huge sums of money to pay its own floating indebtedness and to furnish the working capital for another company; which was loaning millions of dollars in the money market and which received by way of interest on such loans in one year over $300,000, to recount no other of respondent's activities, had "practically gone out of business" and "disqualified itself by the terms of reorganization from any activity in respect to it" (the *Minneapolis Syndicate case*); or had reduced its activities to the "business of owning the property, *maintaining the investments,* collecting the income, and dividing it among its stockholders" (the *Minehill case;* italics ours); or was a passive "intermediary" doing only that business necessary "to keep up its corporate organization and to collect and distribute the rent received from its single lessee" (the *Emery, Bird, Thayer case*)? Is the Chile Copper Company not rather in every sense

one which is " still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes " (the *Von Baumbach case*)? We contend that it is.

(C) THE DECISIONS OF UNITED STATES CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS

The District Court in its opinion in the case at bar, which was affirmed in a mere memorandum opinion by the Circuit Court of Appeals, refers to and relies upon a number of cases involving the question of " doing business " which have been decided in the lower Federal courts. Respondent in its briefs in the courts below also placed great reliance upon these rulings. We do not deem an extended review of these cases necessary. In the first place, no clearly consistent rule can be gathered from them. While a number of them seem on their face to indicate a reluctance on the part of some of the courts to accept what the Government thinks is the meaning of the decisions of this Court, there are also to be found decisions of other lower courts which seem to support the Government's view. In the second place, so far as we can find (with the exception of *International Salt Company* v. *Phillips,* decided December 10, 1925, by the Circuit Court of Appeals for the Third Circuit, not yet reported, now pending before this Court on petition for writ of certiorari, and *Three*

Forks Coal Company v. *United States,* decided October 29, 1925, by the District Court for the Western District of Pennsylvania, now on appeal before the Circuit Court of Appeals for the Third Circuit) there is no case yet decided which involves facts in any way closely analogous to those in the present case. As said by this Court in the *Von Baumbach case,* it is evident " that the decision in each instance must depend upon the particular facts before the court." Accordingly the case must be determined solely upon the basis of its own facts.

It is submitted, therefore, that the decisions of the lower courts are of no value in the present case so far as they enlarge upon, transcend or conflict with, as many of them do, the principles laid down by this Court in the decisions which we have just reviewed. If this case it to be decided on the basis of a principle announced by decision, the decisions of this Court alone must be the guide.

CONCLUSION

In brief, the Government's contention is that this Court has judicially defined business as " that which occupies the time, attention, and labor of men for the purpose of livelihood or profit," and has made clear its views as to what constitutes doing business by carefully distinguishing between active and inactive corporations. It has never held that the financing and controlling of the operations of another corporation (without which the latter

could not effectively operate), or the making of investments, or loaning money to outsiders, to recount only some of the respondent's activities, do not constitute doing business. On the contrary, the trend is distinctly otherwise. We submit, therefore, that when respondent engaged in those and other activities set out in the record—in all of them actively carrying out the very purpose of its organization—it was "doing business" within the meaning of the decision of this Court in the case of *Von Baumbach* v. *Sargent Land Company*, 242 U. S. 503, and the cases therein cited; it not only possessed, but substantially exercised and enjoyed the privilege of doing business with the advantages arising from corporate organization.

For these reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Attorney.

FEBRUARY, 1926.

○

INDEX.

AUTHORITIES CITED

No. 375.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1925.

WILLIAM H. EDWARDS, Collector of Internal Revenue, Second New York District,

Petitioner,

AGAINST

CHILE COPPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE COMPANY, RESPONDENT.

Opinions of the Courts Below.

This was an action brought by respondent, Chile Copper Company, for the recovery of capital stock taxes, on the ground that respondent was not "carrying on or doing business" within the meaning of the statutes. The District Court so held and gave judgment in favor of respondent. (R. 47, 50.)

Chile Copper Co. v. *William H. Edwards, Collector,* 294 Fed. 581 (S. D. N. Y.) (Judgment dated Dec. 1, 1923, R. 50).

The Circuit Court of Appeals for the Second Circuit affirmed this judgment upon the opinion of the District Court (R. 55).

William H. Edwards, Collector, v. *Chile Copper Co.,* 5 F. (2d) 1014 (Judgment dated Feb. 24, 1925, R. 55).

Grounds of Jurisdiction.

The complaint of Chile Copper Company (hereafter referred to as the Company), filed in the United States District Court for the Southern District of New York, alleged that capital stock taxes for the years 1917 to 1920 had been erroneously collected from it, and that the Company was a holding company owning the entire capital stock of Chile Exploration Company, a mining corporation. The complaint set out the entire activities of the Company during the periods upon which depended any liability to the tax. The United States made a motion to dismiss the complaint upon the ground that it did not state a cause of action. This motion had the effect of a demurrer in admitting the material allegations of the complaint (*Am. Litho Co.* v. *Dorrance-Sullivan Co.,* 241 N. Y. 306, 150 N. E. 125 (1925)). The District Court denied the motion and by agreement of the parties gave judgment for the Company in the amount demanded, viz., $213,188.64, with interest (R. 50). Upon a writ of error (R. 1) the Circuit Court of Appeals for the Second Circuit affirmed the judgment on the opinion of Judge Learned Hand in the District Court (R. 55). The case was brought to this Court by petition of the United States for a writ of certiorari filed April 21, 1925, and granted May 25, 1925 (R. 55; 268 U. S. 685).

Question Presented.

The sole specification of error by the Government is:

"The court erred in holding that the above enumerated activities of the Chile Copper Company for the

years 1917 to 1920 inclusive did not constitute 'carrying on or doing business' within the meaning of Section 407 of the Revenue Act of 1916 and Section 1000 of the Revenue Act of 1918."

The question is, therefore, whether on the facts set forth in the complaint and admitted by the Government's motion to dismiss, this holding was correct.

Statement Regarding Facts.

This case must be decided upon the facts as set forth in the complaint (R. 2-46). These facts have been correctly summarized in the statement of facts made at pages 2-7 of the Government's brief. Attention will be directed below to certain inferences of fact believed not to be warranted by the Record, which are made in the Government's brief (pp. 18-23) in the course of argument.

It may here be noted that the authorization and issuance of bonds by the Company occurred only in the first taxable period involved, viz., January 1, 1917—June 30, 1917 (R. 3). The question presented by the investment of funds in call loans and Liberty Bonds concerns only the fourth taxable period, July 1, 1919—June 30, 1920. The Revenue Act of 1918, Section 1000, provides that the tax shall not apply to any corporation which was not engaged in business during the preceding year ending June 30th. The investments in question were made only during the third and fourth taxable periods (1918-1919; 1919-1920). Since no investments were made during the year preceding the third period, they cannot create any tax liability for the third period. They affect the tax liability of the Company, if at all, only during the last period.

The Statutes Involved.

The Company's liability for capital stock taxes for the first two periods (Jan. 1, 1917—June 30, 1917; July 1, 1917

—June 30, 1918) is governed by Section 407 of the Revenue Act of 1916, the relevant part of which is as follows:

> "Sec. 407. That on and after January first, nineteen hundred and seventeen, special taxes shall be, and hereby are, imposed annually, as follows, that is to say:
>
> Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any State or Territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint-stock company or association, or insurance company, equivalent to 50 cents for each $1,000 of the fair value of its capital stock and in estimating the value of capital stock the surplus and undivided profits shall be included: * * * *And provided further,* That this tax shall not be imposed upon any corporation, joint-stock company or association, or insurance company not engaged in business during the preceding taxable year, or which is exempt under the provisions of section eleven, Title I of this Act." *Sec. 407, Revenue Act of 1916 (39 Stat. 789).*

The latter two periods (July 1, 1918—June 30, 1919; July 1, 1919—June 30, 1920) fall under Section 1000 of the Revenue Act of 1918, which reads as follows:

> "Sec. 1000. (*a*) That on and after July 1, 1918, in lieu of the tax imposed by the first subdivision of section 407 of the Revenue Act of 1916—
>
> (1) Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year ending June 30, as is in excess of the $5,000. In estimating the value of capital stock the surplus and undivided profits shall be included; * * *.
>
> (*c*) The taxes imposed by this section shall not apply in any year to any corporation which was not engaged in business (or in the case of a foreign corpora-

tion not engaged in business in the United States) during the preceding year ending June 30, nor to any corporation enumerated in section 231." *Sec. 1000, Revenue Act of 1918 (40 Stat. 1126).*

SUMMARY OF ARGUMENT.

I.

By the language and basis of the law, capital stock taxes are imposed only upon those corporations "carrying on or doing business" in some real and substantial sense. Under the test laid down by this Court, the courts below correctly held that the activities of the Company did not constitute such "business".

II.

The lower Federal courts have uniformly and correctly held that the issuance of bonds by inactive property-owning corporations in aid of operating companies does not constitute "carrying on or doing business."

III.

The capital stock tax laws are not to be construed so as to impose two taxes upon the carrying on or doing of business by a single enterprise.

ARGUMENT.

I.

By the language and basis of the law, capital stock taxes are imposed only upon those corporations "carrying on or doing business" in some real and substantial sense. Under the test laid down by this Court, the courts below correctly held that the activities of the Company did not constitute such "business".

In express terms this tax rests only upon corporations "carrying on or doing business". The statutes expressly exempt corporations not doing so. The mere possession of the right to do business is not enough. There must be an exercise of that right, as the Government admits (Brief, p. 10). Without such exercise there is no basis for the imposition of an excise tax, and the statutes in question would be unconstitutional as imposing a direct tax measured by the fair value of the capital stock without apportionment among the states (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 150 (1911)). It is for this reason, as well as because of the language of the statute, that the phrase "carrying on or doing business" has been held to require some substantial activity or course of dealing, for the sake of profit—in short, to have the ordinary everyday sense of the term "doing business".

As pointed out in the Government's brief, this Court, in five cases decided under the Corporation Excise Tax Act of 1909 (36 Stat. 11, 112, Ch. 6), which also rested upon corporations "carrying on or doing business", has laid down the principles governing the meaning and application of the phrase in question. The courts below did not intend to apply, nor does the Company urge, any test as to what constitutes doing business other than that expressed in those decisions. The most recent of them, *Von Baumbach* v.

Sargent Land Co., 242 U. S. 503 (1917), in summing up the effect of the prior cases, contrasts corporations which merely own and hold property and distribute the avails thereof with those which are still actively engaged in—

> "continued efforts in the pursuit of profit and gain".

In the same vein, the Circuit Court of Appeals for the Third Circuit has recently said (*International Salt Company* v. *Phillips*, December 10, 1925, unreported) that the phrase indicated—

> "positive, aggressive acts, incidental to the active carrying on or doing business for gain".

Similarly, Judge Learned Hand, in the case at bar, stated:

> "The term 'business' means some profitable activity undertaken on its own account" (R. 48).

The Government's brief (p. 19) sets out the language of this Court in the Sargent case, above referred to, and insists that it be applied as the test of the Company's status. The Company agrees, but we believe the Courts below were correct in holding that the Company falls within the class of inactive property owners which cannot be regarded as carriyng on or doing business. The activities of the Company during the years in question (these being set out in full in the complaint as admitted by the Government's motion for judgment) will be found not to include a single "effort in the pursuit of profit", much less "continued efforts".

The Company was organized in 1913, not because Chile Exploration Co. (hereinafter referred to as "Chile Exploration") needed any assistance in the operations of mining or marketing copper, but because by reason of peculiarities of the law of Chile where the mining enterprise is located, Chile Exploration could not effectively mortgage its property to secure more capital for plant and equipment (R. 2, 3, 8, 13, 19). The activities of the Company have been only those necessary to fulfill the purpose of securing capital for

the mining company. These activities fall into three groups which will be discussed in order, viz:

(1) It has owned and held all the stock of Chile Exploration, received dividends thereon and voted this stock by proxy.

(2) During the first period it borrowed money by a bond issue, pledged the stock as security and during all four periods made advances from the proceeds for the capital purposes only of Chile Exploration.

(3) During the third and fourth periods it invested certain of the proceeds, temporarily on its hands pending their withdrawal by Chile Exploration, in call loans and Liberty bonds (R. 2-23).

The first group is characteristic of an inactive property owner. Owning and voting stock and receiving dividends certainly involve no "efforts in the pursuit of profits". The profits realized by the Company were solely the result of the continued efforts of Chile Exploration. In the hands of the Company, the profits were the mere fruit of stock ownership. In this aspect, the Company was an "intermediary" in exactly the same sense as the corporation holding title to premises occupied by a dry goods business and receiving and distributing rentals therefrom, in the case of *U. S.* v. *Emery, Bird, Thayer Co.*, 237 U. S. 28 (1915) (Government's Brief, p. 17). There was but one business enterprise, the mining and marketing of copper. The Company was a mere adjunct of this enterprise and was no more conducting the business than was the lessor corporation conducting the railroad business in *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295 (1913). Voting power, of course, went along with the stock as an incident to its ownership. The Commissioner of Internal Revenue has recognized the inactive status of a typical holding company:

> "Holding companies as distinguished from parent corporations * * * are not doing business" *Article* 13, *Regulation* 64, 1924 *Edition.*

This ruling is in harmony with the uniform decisions of the Federal courts that holding companies are not "carrying on or doing business".

U. S. v. *Nipissing Mines Company,* 206 Fed. 431 (1913, 2nd C. C. A.; writ of error dismissed on motion of U. S., 234 U. S. 765).

International Salt Co. v. *Phillips* (Dec. 10, 1925, 3rd C. C. A., unreported).

Three Forks Coal Co. v. *U. S.* (October 29, 1925, W. D. Pa., unreported).

Butterick Co. v. *United States,* 240 Fed. 539 (1917 S. D. N. Y.; writ of error dismissed on motion of U. S., 248 U. S. 587).

The Government is clearly in error if it means to contend that the Company is doing business because it has not "reduced" its activities and is still carrying out the purposes for which it was organized. The passage quoted (p. 19 of Government's Brief) from the *Sargent* case cannot be understood as laying down any such rule: so construed, the passage would by dictum overrule the case of *U. S.* v. *Emery Bird, Thayer Co., supra,* decided by a unanimous court two years previously, and cited with approval in the *Sargent* decision. The opinion in the *Emery, Bird, Thayer* case called express attention to the fact that the corporation there held not to be doing business was carrying out its characteristic charter functions without reduction in activities. It must be immaterial whether a corporation has *reduced* its activities to the mere ownership of property and acts incidental thereto, or has always *confined* its activities within those limits. The passage quoted in the Government's brief (p. 19) from the *Sargent* case should not be isolated from the sentence of the same paragraph immediately preceding it, which reads:

> "It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court."

In using the word "reduced" in the sentence next following the above, the Court undoubtedly had in mind the *facts* of earlier cases (*Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187 (1911); *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295 (1913)) where the corporations had at some time in their history abandoned active business pursuits of their own and become inactive property owners.

On this point, Judge Learned Hand in the case at bar said (R. 47):

> "It is quite true that this plaintiff has been doing all that it was organized to do, and that this feature constantly runs through the cases, as if it were in some sense a test of whether it was 'doing business' at all. Yet I cannot think that this would be a sound rule, or that it makes any difference whether the chartered powers are fully employed or not, because as Mr. Justice Holmes said in *U. S.* v. *Emery-Bird, Thayer Realty Co.*, 237 U. S. 28, the question is what it does and not what it can do. There would be no justification in treating two corporations differently who did exactly the same things merely because one had an extensive charter and the other did not."

Notwithstanding the clear holding of the *Emery-Bird, Thayer* case, the Government contends (Brief, p. 13) that corporations organized for the purpose of doing business, *and engaged in the activities for which organized* (italics ours), are doing business (an obvious proposition if taken literally); and cites three real estate corporation cases which were among those decided by this Court *sub nom. Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911), primarily on the constitutionality of the Act of 1909. Two of the cases, the *Park Realty Co.* and the *Clark Iron Co.*, came up on appeal from the trial courts which had sustained demurrers to bills in the nature of stockholders' suits to restrain payment of the tax. In the third, the *Broadway Realty Co.* case, there was an answer admitting the allegations of fact and denying unconstitutionality, and a decree on the pleadings dismissing the bill. The extremely meagre statement of facts given in the opinion

regarding the corporations in question and the summary method in which Mr. Justice Day disposes of the issue of "doing business" becomes more understandable when one examines the record.

The three bills were drawn solely to test the constitutionality of the Act and the pleader confined attention to this issue by averring, either expressly or in effect, that the corporation was subject to the tax. Thus, in the *Clark Iron Co.* case, the bill stated that the corporation was in the business of watching over and caring for certain lands, etc., and that it did *not* come within any of the classes of corporations excepted by the terms of the Act from payment of the tax. In the *Park Realty Co.* case, the bill alleged that the corporation was engaged in the management and leasing of a hotel and that it came within the terms and purview of the Act. In the *Broadway Realty Co.* case, the bill alleged that the corporation was engaged in the business of managing an office building, collecting rents therefrom, etc. Not only did the bills of complaint show affirmatively that the corporations were "carrying on or doing business" but no issue on this point and no contention to the contrary is made in the demurrers or the answer filed to the bills, or the decisions of the courts thereon, or the specifications of error or the briefs filed by either side upon appeal to this Court.

The Government also cites the *Flint* v. *Stone Tracy* case as holding that making investments constitutes doing business (Brief, p. 13). We do not so understand it. Only one of the seven cases mentioned on the issue of doing business in the *Flint* v. *Stone Tracy* decision contained any allegation in the bill of complaint regarding the making of investments, viz., *Phillips* v. *The Fifty Associates,* and here the fact appears only inferentially from the last clause of one sentence of the bill, as follows:

> "* * * nor is it so engaged at all except in so far as the doing of the same may be an incident to the management of its property or the investment of its funds".

It would have been necessary in any event to have held the Associates to be doing business for the bill alleged:

> "The business of said corporation so far as it may be called a business is the holding and *managing* of the property aforesaid (real estate, interests therein, and leaseholds thereof) and such business is transacted and conducted within the city of Boston * * *." (Italics ours.)

Mr. Justice Day does not single out the question of making investments, either as to that or as to any other case, but includes it as a part of the comprehensive statement of corporate activities quoted by the Government (Brief, p. 12). The *Flint* case cannot be regarded as holding anything whatever as to the making of investments since the issue of doing business was never presented so as to turn on that activity.

The *Flint* v. *Stone Tracy* decision on the issue of doing business should be held to mean at most only what this Court itself stated it to mean in the companion case of *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187, 190 (1911):

> "that corporations organized for profit under the laws of the State, authorized to *manage* and rent real estate, *and being so engaged,* are doing business within the meaning of the law and are therefore liable to the tax imposed". (Italics ours.)

The second activity of the Company—borrowing money by a bond issue and advancing the proceeds to Chile Exploration for capital purposes only—cannot be considered an "effort in pursuit of profit". No profit was expected from the borrowing of the money or the advancing of it to Chile Exploration. The Company borrowed the money at six per cent., plus discount and expenses incidental to the issue of bonds, and advanced the proceeds on open account to Chile Exploration at six per cent (R. 4, 5, 10, 15, 21, 26, 27).

This operation was not "carrying on business", for the object of business activities is profit. The fact that the Com-

pany pledged its credit in a large sum, without expectation or realization of profit, shows that the Company was a mere adjunct of the mining business. The Company did not even become the owner of the structures and property purchased with the borrowed funds (R. 5, 10, 15, 21). Is it conceivable that the realty corporation in the *Emery, Bird, Thayer* case would have been held doing business if as a part of its functions as an "intermediary" it had placed a mortgage upon the premises and had turned the proceeds over to the dry goods company for a new wing on the store? If such an act by a property owner is doing business, the constitutional limitation upon direct taxation and the distinction between direct taxes and excise taxes cease to have any but an academic interest. We shall cite under II, *infra*, decisions from four Circuit Courts of Appeals indicating the correctness of the holding below that the Company's issuing of bonds in aid of an enterprise the stock of which it owned did not constitute doing business.

The third activity of the Company—the investment of temporary funds in call loans and to some extent in Liberty bonds was not an "effort in the pursuit of profit" but was an incidental activity not expected to yield any profit and not yielding any. The Company was organized for the principal purpose of holding and pledging the stock of Chile Exploration. It was not organized for the purpose of being an investment company or of investing generally (R. 3, 8, 13, 19). It happened that in the latter two of the years in question, payments on bond subscriptions accumulated somewhat in advance of withdrawals by the operating company (R. 16, 22). It was necessary, as far as possible, to protect these temporary funds from impairment by the six per cent. interest charge on the bonds. The method of investing in call loans is a customary, well-understood means of handling funds which have to be kept liquid, and is a mere alternative to ordinary bank deposits. The details were all attended to by the banks (R. 16, 22). The net result of the loans, as well as of the purchase of Liberty bonds was still a loss to the

Company since the interest received was less than that paid on the bonds. If this function constituted an "effort", at least it was one from which no "profit" was expected and none made.

In every essential respect, this activity (and all the activities of the Company) is covered by the decision of this Court in *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295 (1913), where the maintenance of a "contingent fund" in the form of investments was held not doing business, this being as in our own case, purely incidental to the main purposes of the corporation. The distinction attempted to be drawn in the Government's brief (p. 17) between "maintaining" investments and investing funds on hand disappears entirely in the light of the facts stated in the dissenting opinion in the *Minehill* case, to the effect that the corporation there was engaged "in passing upon and choosing securities in which corporate funds are to be invested." This was of the same nature as the corresponding incidental activity in the case at bar. On this point, we submit that the decision of Judge Learned Hand in the case at bar was a correct application of the *Minehill* case. He said (R. 48):

> "As things are, the nearest approach to a separate business is the plaintiff's investment of its funds in call loans. That, however, falls quite within the rule in *McCoach* v. *Minehill Ry. Co., supra.*"

The *Minehill* case does not state the amount of funds invested but from the fact that the annual return was about $24,000 (228 U. S. 295, 299), the amount invested must have been $400,000 or more. The mere fact that the Company's invested funds were larger is no ground for a distinction. It should also be noted that the call loan totals stated by the Government (Brief, pp. 6, 7) are aggregate sums, arrived at by adding the total of all the loans made and repaid during the period in question. The maximum amount of such loans outstanding at any one time during the third period was $5,000,000 and the average during that period was $3,-

370,000. The maximum outstanding during the fourth period was $9,100,000 and the average for that period was $4,962,500 (R. 16, 22, 34, 40).

These are the corporation's activities as revealed by the Record and as considered in the courts below. The Government may well have entertained some doubt as to whether any one or all of these activities together constituted "continued efforts in the pursuit of profit" for the Government has enlarged upon them by inferences which on examination are not supported by the admitted facts.

The Government's brief (p. 20) states that the purpose of the Company's organization—

> "was to do all those things essential to the continued operation of Chile Exploration Company, because the latter company would otherwise have been unable to operate effectively".

Contrast this with the statement of the Record (R. 3, 8, 13, 19), viz.:

> "Plaintiff was * * * organized * * * for the principal purpose of holding the capital stock of said Chile Exploration Company and pledging such capital stock as security for bond issues * * *".

The Record shows that the Company had *nothing* to do with the *operation* of Chile Exploration. Chile Exploration owned the ore deposits, the mining plant, and refineries (R. 3, 5, 9, 10, 14, 15, 20, 21). The mining business was the business of Chile Exploration (R. 2, 8, 13, 19). Chile Exploration did not even employ the Company in connection with the marketing or purchasing end of the business (R. 4, 9, 14, 21). The Company's function was to *hold* stock and *pledge* that stock (R. 3, 8, 13, 19, 32, 38).

It is next stated (Brief, p. 20) that the Company "conducted negotiations" with regard to borrowing money, and "did all else necessary to make the bonds salable." These alleged activities are not in the Record. The Record is a *complete* enumeration of the Company's activities during the

periods in question (R. 3, 9, 14, 20), and the Government so admitted by its motion for judgment. Aside from this, unless the issuing of the bonds was itself doing business, it cannot be material that incidental steps in regard thereto were taken.

It is stated (Brief, p. 20) that the Company—

> "saw that the proceeds of the bonds were applied in accordance with the agreement,"

and that the Company was—

> "manager of the funds raised by the sale of the bonds and supervisor of the spending of the money."

This again is contrary to the Record which, so far as it bears on this issue, merely states that the Company agreed to and did furnish the trustee for bondholders statements showing the application of the proceeds to the purposes required by the trust agreement (R. 6, 10, 15, 22). The Company neither saw to the application of the proceeds of the bonds nor supervised the spending thereof. If we are to indulge in speculation as to the source of the statements which the Company furnished, it is at least as proper to suppose that they were compiled and prepared by Chile Exploration as that the Company prepared such statements on the basis of its own investigation, there being no mention of such activities by the Company in the Record. Apart from this, unless it be held that issuing the bonds was doing business, seeing that the proceeds were applied as directed in the trust agreement would hardly amount to doing it.

Three times in the brief of the Government, it is said that the Company furnished "working capital" to Chile Exploration Company (pp. 18, 21, 22). The Record states exactly the contrary, viz: that all the funds advanced to Chile Exploration Company were used for the acquisition of property *"properly chargeable to capital account"* (R. 5, 10, 15, 21). This was in accord with the stipulation of the trust agreement under which the bonds were issued (R. 4, 9, 13, 20).

Most important perhaps of the unfounded inferences is on pages 21 and 22, viz: that in substance the Company was carrying on the mining business through the agency of Chile Exploration, that the Company was—

> "arbiter of the necessities of its (Chile Exploration's) business".

The Government's brief even sets out in italics the statement that the Company furnished the money—

> "and directed the work of that money through the Exploration Company".

Here again in a vital particular, the Government is contradicted by the Record which contains no such activity (R. 3, 9, 14, 20). The Company did vote by proxy the stock of Chile Exploration and thereby elect its directors (R. 4, 9, 14, 21). Presumably, every holding company does the same. It is an act incidental to stock ownership. It by no means indicates that the operating company through its directors and officers does not manage its own affairs.

The Government admits that Chile Exploration was not technically the agent of the Company (Brief, p. 21). It errs in asserting that as a practical matter Chile Exploration was an agent of the Company. The mining business was the business of Chile Exploration and the Company was formed and availed of merely to procure additional capital (R. 2, 3, 8, 9, 13, 14, 19, 20, 32, 38). The Record shows affirmatively (since the complaint states no such activity) that the Company did *not* direct the work of the additional capital through Chile Exploration, and that it did *not* interfere in, direct or control the operations of the mining company. No such direction or control was presented for the consideration of the courts below.

The effort to make it appear that the Company was in the copper business through an agent has significance as showing that the Government realizes that only one business enterprise is involved in the case at bar, that the only efforts in the pursuit of profit shown by the Record were the efforts of that enterprise, and that the holding company must be brought into some closer connection with those efforts than

mere stock ownership in order to be considered doing business. Nothing in the Record, however, indicates that any more active relation existed.

The Government's brief (pp. 18, 22) seeks to emphasize the *number* of things which the Company did and the *amount* of money invested in call loans; but the important question is the *nature* of the activities—whether they were of the sort which are properly called "doing business". It is true, as the *Sargent* case points out (242 U. S. 503, 517), that no particular amount of business is required to bring the Company within the terms of the Act. No issue as to the amount of business, however, arises till it be found that the activities of the Company had such a purpose and such a degree of continuity as to constitute "business" at all.

Summarizing:

In so far as the Company was a property owner, receiving the avails of the stock of Chile Exploration and exercising rights purely incidental to such ownership such as voting the stock, the decisions of this Court make it plain that the Company was not doing business (*U. S.* v. *Emery, Bird, Thayer Co.*, *McCoach* v. *Minehill Ry. Co.*, and the language of the *Sargent* case, *supra*). We do not understand the Government to contend the contrary.

The second activity—issuing and selling bonds and advancing the proceeds to Chile Exploration for capital purposes—was not an effort in the pursuit of profit and was incidental to the ownership of the stock of the corporation conducting the business enterprise. Its effect has not been directly passed upon by this Court, and will be considered more at length in connection with the presentation under Point II following of the body of authority from the lower federal courts sustaining the position of the Company.

The effect of the third and only other activity of the Company appearing in the Record—the investment of temporary funds in call loans and Liberty Bonds—is settled as incidental to ownership and as not constituting "doing business" by the ruling of this Court in *McCoach* v. *Minehill Ry. Co.* (*supra*).

II.

The lower Federal courts have uniformly and correctly held that the issuance of bonds by inactive property-owning corporations in aid of operating companies does not constitute "carrying on or doing business".

During the first taxable period, January 1 to July 30, 1917, the Company authorized an issue of bonds to have a face value of $100,000,000, and issued a part of these bonds having a face value of $35,000,000 (R. 4, 5). Under the terms of the trust agreement (R. 26) the proceeds of the bonds, after repaying certain floating indebtedness existing at the date of issue, could be used only for the following purpose:

> "The acquisition, construction, or improvement (properly chargeable to capital account) after April 1, 1917, of property necessary or useful in connection with the mining, refining, or marketing of copper or copper ore derived from deposits in the Province of Antofagasta, Chile, which property upon acquisition or at the date of construction or improvement will belong to the exploration company or to a subsidiary company." (R. 4, 9, 13, 20.)

Advances were made to Chile Exploration as requested by it and when it needed funds for capital purposes (R. 6, 10, 15, 22). Such advances were used by Chile Exploration, in accordance with the foregoing provision of the trust agreement, solely for the acquisition of property "properly chargeable to capital account" (R. 5, 10, 15, 21). The courts below held that this issuing of bonds did not constitute a carrying on of business by the Company. In this holding they are supported by decisions of three other Circuit Courts of Appeals in railroad-lease cases.

During the years 1914-1917, the First, Second, Third and Sixth Circuit Courts of Appeals decided a series of cases of

the *McCoach* v. *Minehill Ry. Co.* type (*supra*), wherein railroad and public utility companies had leased their properties to operating companies. Thereafter, in addition to the receipt and distribution of rentals, the lessors had issued and sold bonds or stock and advanced the proceeds to their lessees for capital purposes such as the extension of the road or the purchase of new equipment. In these cases the decisions of this Court were carefully analyzed, and it was held without exception or dissent that the bond issues were an incident to the functions of the lessors as property owners and did not amount to engaging in business; and that, notwithstanding this additional activity, the cases fell within the doctrine of *McCoach* v. *Minehill Railway Co.*

In every essential respect the situation of the lessor corporations corresponds to that of the Company. In both, the bond-issuing corporation is fundamentally a property owner, deriving income in the form of rents or dividends not from its own activities but from those of another company. In both, bonds were issued in amounts and at times determined by the needs of the operating concern and upon its request. In neither situation was there any expectation of profit or realization thereof by the issuer. The proceeds were in all cases invested in property used by the active corporations, and thereafter, as before, the issuer remained a property owner, not an operator.

Only one distinction of any consequence can be drawn between these two situations, and that distinction would indicate that ours is an *a fortiori* case of not doing business. The interests of lessor and lessee railroads are often opposed and their ownership may be in different hands. Litigation is frequent between them. To a greater extent than a holding company such as respondent, they may be considered separate business units with separate purposes. In the case at bar, the identification in interest and ownership between the Company and Chile Exploration is complete. The Company is but an adjunct, an appurtenance of Chile Exploration, in the same sense that the company holding title

to the real estate was an adjunct of the dry goods company, in *U. S.* v. *Emery, Bird, Thayer Co.*, 237 U. S. 28 (1915).

The railroad cases cannot be distinguished on the ground that the lessors were originally organized to operate railroads and that a bond issue by them would in any event be a purely incidental function, whereas it was a direct part of the corporate purpose of the Company. The *Emery, Bird, Thayer* case (237 U. S. 28, 32), in rejecting an attempted distinction of this sort, held that:

> "The question is rather what the corporation is doing than what it could do."

In the case at bar, the Company *did* the same thing as the railroad lessors.

The Government's brief makes no attempt to distinguish these lessor cases. They are so numerous as to constitute a settled body of law. They should not be lightly disregarded. Their authority, and their interpretation of the decisions of this Court will be entirely discredited if this Court holds in the case at bar that the borrowing of funds by the bond issue of 1917 constitutes doing business.

We cite below only certain of these cases wherein the facts are clearly analogous to those of the case at bar. The activities of the lessors are indicated under each citation.

Public Service Ry. Co. v. *Herold*, 229 Fed. 902 (1916, 3rd C. C. A.).

Application to State Board for leave to issue bonds; issuance of bonds, in part to reimburse lessee, in part to refund maturing bonds; sale of stock and bonds by lessor and advancement of the proceeds to lessee.

Traction Companies v. *Collectors of Internal Revenue*, 223 Fed. 984 (1915, 6th C. C. A.).

Issue of treasury stock and of reserve bonds which were in the hands of a mortgage trustee, to pay for extensions

and betterments made by the lessees; joining in conveyance of real estate sold by lessee; investment of accumulated funds.

Anderson v. *Morris & E. R. Co.*, 216 Fed. 83 (1914, 2nd C. C. A.).

Issue of bonds of a face value of $1,400,000, part of a series of such bonds issued and delivered to the lessee for capital expenditures.

N. Y. C. & H. R. R. Co. v. *Gill*, 219 Fed. 184 (1915, 1st C. C. A.).

Issue of bonds to pay off additional loan required by the lessee, and exercise of power of eminent domain.

McCoach v. *Continental Passenger Ry. Co.*, 233 Fed. 976 (1916, 3rd C. C. A.).

Reduction of indebtedness by means of a sinking fund and renewing of bonded indebtedness by corporate action.

Other railroad-, or public utility-lease cases where the lessors were held not doing business, are cited below. Each of these cases involves some incidental activity, such as the purchase of new property, exercise of the power of eminent domain, sale of part or all of the property, making of improvements and betterments directly by the lessor, in pursuance of a term of the lease, preparation to pay mortgage indebtedness, etc.:

Lewellyn v. *Pittsburgh B. & L. E. R. Co.*, 222 Fed. 177 (1915, 3rd C. C. A.)

Jasper & E. Railway Co. v. *Walker*, 238 Fed. 533 (1917, 5th C. C. A.)

Miller v. *Snake River Valley R. Co.*, 223 Fed. 946 (1915, 9th C. C. A.)

State Line & S. R. Co. v. *Davis*, 228 Fed. 246 (1915, M. D. Pa.)

As stated on the basis of these decisions by Judge Learned Hand in his opinion in the case at bar:

> "Had this been a lease I think there could be no doubt. The different incidents of the plaintiff's activity have all been passed on. * * * Had the plaintiff leased its property to the Exploration Co., and thereafter done what it did, there can be no doubt that it would not have been liable to the tax" (R. 47, 48).

It should be noted further that there have been four decisions by the Federal courts, besides the case at bar, on the question of "doing business" under the Capital Stock Tax Acts. Two of these have involved holding companies and two, real estate-owning corporations. In each instance the company has been held not to have been doing business. The Government's brief (p. 24) admits that the facts of two of the cases were in some degree analogous to the case at bar, but it passes over these holdings like those of the railroad-lease cases with the single comment (p. 23) that they—

> "seem on their face to indicate a reluctance on the part of some of the courts to accept what the Government thinks is the meaning of the decisions of this Court . . ."

The asserted reluctance will not be found in the cases themselves. They are a studied attempt to apply the decisions of this Court. In common with Judge Learned Hand, in the case at bar, they interpret these decisions as not applying the term "carrying on or doing business" to corporations which do not strike out for their own profit but receive and transmit the fruits of another's efforts. This controlling characteristic has not been allowed to be obscured by the fact that the corporation in each holding-company case borrowed money and purchased bonds or stock of an operating company. The facts are outlined under the citations.

International Salt Co. v. *Phillips* (Dec. 10, 1925, 3d C. C. A., unreported)

A holding company, issuing its own bonds (3 F. (2d) 678, 681), borrowing money and endorsing notes of a subsidiary in large amounts, and from time to time purchasing bonds of another subsidiary (substantially every activity of the Chile Copper Co.). The Court made the following important statement:

> "The owning of stock, the receipt and distribution of dividends, the endorsing of the notes of a company whose stock it held, the purchase of bonds for retirement or sinking fund purposes, amount to no more than acts incidental to the ownership of property. They are not the positive, aggressive acts incidental to the active carrying on or doing business for gain but rather the receipt of the gains of business capitalized in ownership."

Three Forks Coal Co. v. *U. S.* (Oct. 29, 1925, W. D. Pa., unreported).

A holding company, purchasing shares of its subsidiary from time to time, selling a block of such shares, and borrowing money to pay interest, taxes and indebtedness.

Cannon v. *Elk Creek Lumber Co.,* 8 F. (2d) 996 (1925, 7th C. C. A.).

A corporation, organized to buy in specific real estate upon foreclosure and hold it; protecting and surveying it and attempting to make a sale.

Lane Timber Co. v. *Hynson,* 4 F. (2d) 666, (1925, 5th C. C. A.).

A corporation owning a tract of timberland and having agents who continually solicited a sale thereof.

III.

The capital stock tax laws are not to be construed so as to impose two taxes upon the carrying on or doing of business by a single enterprise.

Chile Exploration, which has at all times carried on the mining business and owned the physical property, has paid capital stock taxes during the years in question (R. 3, 9, 14, 20). If capital stock taxes are imposed upon the Chile Copper Company also, double taxation results, for the Company's principal asset is the stock of Chile Exploration and both taxes will therefore be measured by the same values (R. 27).

It is a general principle of the construction of statutes imposing taxes that the courts are reluctant to construe and apply a statute in such a manner as to impose double taxation. *Tennessee* v. *Whitworth*, 117 U. S. 129 (1886); *Matter of Cooley*, 186 N. Y. 220 (1906); *Bank of California* v. *Richardson*, 248 U. S. 476 (1919); *Crocker* v. *Malley*, 249 U. S. 223 (1919).

This Court held that the Corporation Excise Tax Law of 1909, similar in its nature to the capital stock tax, should not be construed so as to fall twice upon the same enterprise.

> "The Corporation Tax Law does not contemplate double taxation in respect of the same business."
>
> *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295, 304.

In the *Minehill* case, the 1909 Law did not so clearly result in double taxation since the excise was measured by net income and the lessee could deduct the rental as an expense, the tax on it being paid only by the lessor. It is natural to find that under the Acts of 1916 and 1918, where the tax is measured by the value of the capital stock, the Courts have been all the more reluctant to construe the Acts so as to impose double taxation.

In *International Salt Co.* v. *Phillips, supra,* the Third Circuit Court of Appeals says on this point:

> "Sensing the words (carrying on or doing business) in their common everyday meaning, we are of opinion that Congress, however it might treat the gains of this company as income, did not mean to place an excise tax on the capital stock of such a company as one 'carrying on or doing business.' Its purpose was to put an excise tax on the company really carrying on or doing business, in this case the subsidiary company—and not on the shareholder of the subsidiary who was in receipt of the profits arising from such acts carrying on or doing of business."

In *Three Forks Coal Co.* v. *United States, supra,* the Court cites *McCoach* v. *Minehill Railroad Company, United States* v. *Emery, Bird, Thayer Realty Co.* and *Von Baumbach* v. *Sargent Land Co.,* and says:

> "The thought underlying the cases cited, and a number of others not mentioned, is that two corporations are not to be taxed under the Act of Congress when but one business is carried on."

On this point Judge Learned Hand, in the opinion below, said:

> "But the excise does not exact a double tax for leave to do a single business, and the plaintiff was in substance no more than the personification of a part of the enterprise. Except for the separation of the corporate activities no one would suggest that the Exploration Co. was doing two businesses" (R. 48).

Double taxation inevitably results unless the holding company is held not to be doing business.

The construction of the phrase "carrying on or doing business", adopted by the courts below, is in accord with the further principle that statutes imposing taxes should be

construed against the Government and in favor of the taxpayer.

U. S. v. *Wigglesworth*, 2 Story, 368, 374;
U. S. v. *Isham*, 17 Wall. 496, 504 (1873);
Gould v. *Gould*, 245 U. S. 151, 153 (1917);
U. S. v. *Merriam*, 263 U. S. 179 (1923).

These general considerations support our contention that the Courts below were correct in holding that the Company was not carrying on or doing business during the four taxable periods involved.

Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ARTHUR A. BALLANTINE,
CARROLL A. WILSON,
GEORGE E. CLEARY,
LOWELL TURRENTINE,
Attorneys for Chile Copper Company,
Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 375.—October Term, 1925.

William H. Edwards, Collector of Internal Revenue, Second New York District, Petitioner, *vs.* Chile Copper Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 22, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of taxes alleged to have been erroneously collected for the years 1917 to 1920. The taxes were levied under the Acts of September 8, 1916, c. 463, § 407, 39 Stat. 756, 789, and of February 24, 1919, c. 18, § 1000, (a) (1) and (c), 40 Stat. 1057, 1126. Both statutes impose upon domestic corporations organized for profit a tax 'with respect to carrying on or doing business', at certain rates for the fair value of the capital stock, and both exempt such corporations 'not engaged in business' during the preceding taxable year. The question is whether the plaintiff, the Chile Copper Company, brings itself within this exemption. The facts are set forth in the complaint and the case was heard upon a motion to dismiss. In the District Court judgment was given for the plaintiff, 294 Fed. Rep. 581. The judgment was affirmed on the opinion below by the Circuit Court of Appeals. 5 F. (2d) 1014. A writ of certiorari was granted by this Court. 268 U. S. 685.

The facts are somewhat peculiar. The Chile Exploration Company, a New Jersey Corporation, owned mines in Chile and needed to borrow large sums of money in order to develop them. By the laws of Chile it could not mortgage its mines effectively and therefore could not give security directly for bonds. To meet the difficulty the Chile Copper Company was organized in Delaware for the purpose of holding the capital stock of the Chile Exploration Company, issuing bonds secured by a pledge of the stock, and furnishing the proceeds from time to time to the Exploration Company to enable

the latter to go on with its work. The purpose was carried out. On April 1, 1917, the plaintiff authorized the issue of collateral trust bonds for $100,000,000 to be secured by a pledge of all the above-mentioned stock. During the six months ending on June 30, 1917, it executed an agreement with underwriters and issued $35,000,000 of the bonds, received payments from subscribers, which were deposited in a special account with the Guaranty Trust Company of New York, paid the expenses of the issue from the special account and made provision for the accrued interest payable upon the bonds. It also paid the interest on $15,000,000 of bonds outstanding under an earlier pledge. During the same time stockholders' and directors' meetings were held, directors and officers were chosen, corporate books and accounting records were kept, and such other acts were done and expenses paid as were necessary to keep up the corporate existence. An office was maintained for the activities described. The plaintiff owned and voted on the stock of the Exploration Company, and elected its directors, and made advances to it from the proceeds of the bonds issued in 1917, the Guaranty Trust Company being directed after payment of certain matters not to pay checks drawn upon the special account unless accompanied by a letter from the plaintiff stating that the proceeds would be used for specified purposes connected with the development of the mines. The plaintiff agreed to furnish and did furnish the Guaranty Company statements showing that the proceeds had been so applied. During the six months mentioned the sum of $1,250,000 was advanced to the Exploration Company, and interest upon loans and a part of the bond discount paid by it to the plaintiff and payments on account of a dividend also were made.

The activities for succeeding years were similar, advances to the Exploration Company being made each year. The plaintiff had funds received from the issue of bonds in 1917, in excess of the amounts that it thought proper to advance during the given period to the Exploration Company. A part of these it invested in Liberty Bonds, but the greater part, which it had deposited with the Guaranty Trust Company and the Central Union Trust Company, it authorized those companies to lend on call in the plaintiff's name and at its risk, taking security. If the security was not satisfactory the plaintiff directed the Trust Company to call the loan. During the year ending June 30, 1920, 224 loans

amounting to $37,200,000 were made and 180 loans amounting to $29,100,000 were called. In the same year the plaintiff received $332,366.90 as interest upon these loans. During the previous year it received $194,579.20 upon similar loans.

If the corporation was one that Congress had power to tax in this way, it is hard to say that it is not within the taxing acts. It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit. In our opinion the plaintiff was liable to the tax. We do not rest our conclusion upon the issue of bonds in the first year or the call loans made in the last, and for the same reasons we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole. Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brain or at least the efferent nerve without which that company could not move. The plaintiff owned and by indirection governed it, and was its continuing support, by advances from time to time in the plaintiff's discretion. There was some suggestion that there was only one business and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act. The case is not governed by *McCoach* v. *Minehill & Schuylkill Haven R. R. Co.*, 228 U. S. 295, and *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S. 28. It is nearer to *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503.

Judgment reversed.

Mr. Justice SUTHERLAND took no part in the decision of this case.